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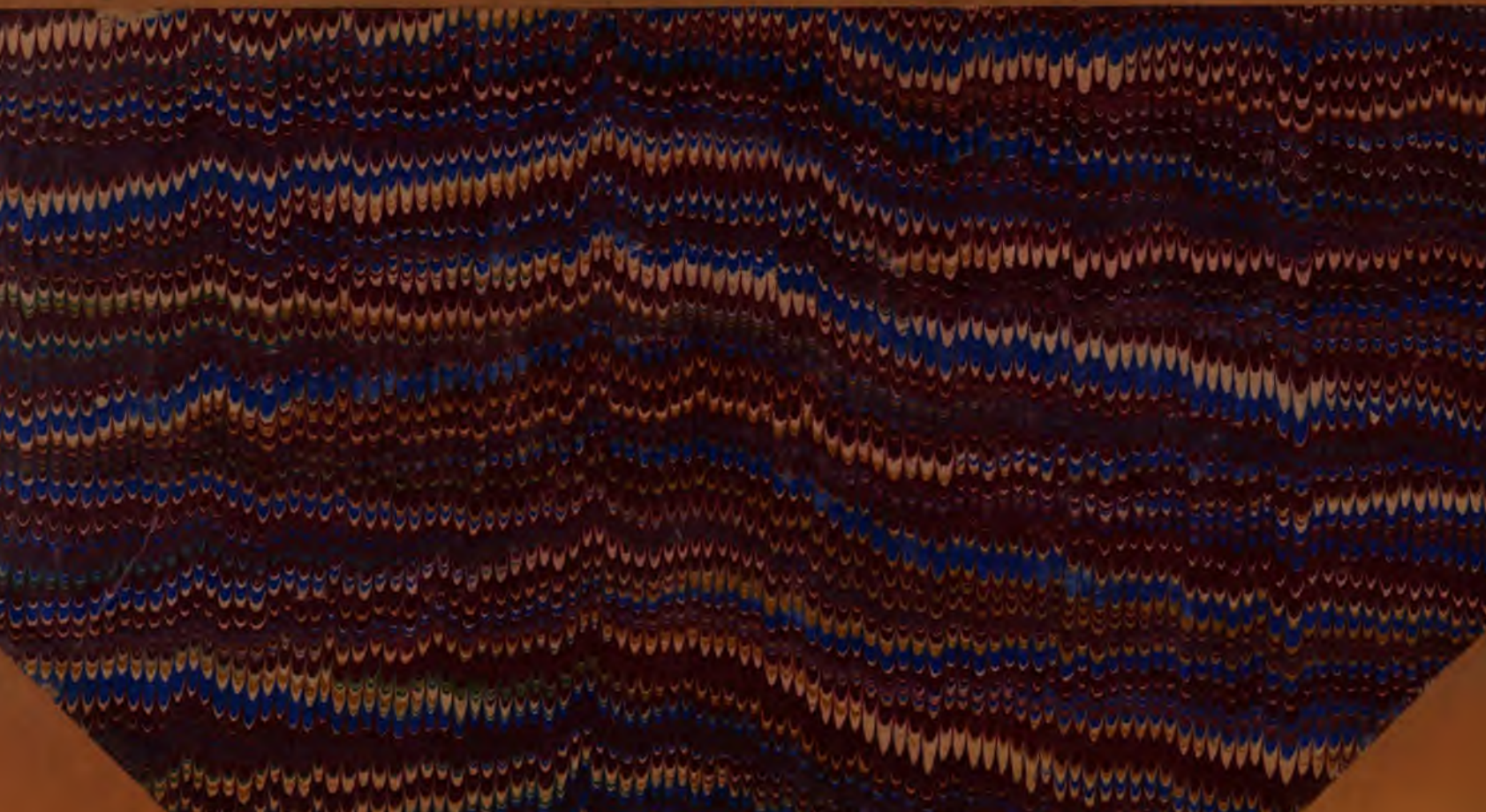

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AINSI QUE

DES CAUSES JUGÉES PAR LA COUR SUPRÊME ET LE CONSEIL PRIVÉ SUR APPEL DE NOS TRIBUNAUX

PAR L'HONORABLE M. MATHIEU

Juge de la Cour Supérieure de Montréal, docteur en droit, professeur à la Faculté de Droit de l'Université Laval à Montréal

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TOME XX

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ABRÉVIATIONS.

P. D. T. M. :—*Précis des Décisions des Tribunaux du district de Montréal*, 1854, par T. K. RAMSAY et L. S. MORIN, avocats.
D. T. B. C. :—*Décisions des Tribunaux du Bas-Canada*, en 17 volumes, commencées en 1851, par MM. LELIÈVRE, ANGERS, BEAUDRY et FLEET, avocats.
J. :—*Lower Canada Jurist.*
L. C. L. J. :—*Lower-Canada Law Journal.*
R. J. R. Q. :—*Rapports Judiciaires Revisés de la province de Québec* par le juge MATHIEU.
R. C. :—*Revue Critique.*
R. L. :—*Revue Légale.*
C. C. :—*Code Civil du Bas-Canada.*
C. M. :—*Code Municipal du Bas-Canada.*
C. P. C. :—*Code de Procédure Civile du Bas-Canada.*
S. R. Q. :—*Statuts Refondus de la Province de Québec.*
C. B. R. :—*Cour du Banc du Roi* ou *Cour du Banc de la Reine.*
C. S. :—*Cour Supérieure du Bas-Canada.*

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SAISIE-ARRET APRES JUGEMENT.

COUR SUPÉRIEURE, QUÉBEC, 9 septembre 1869.

Coram MEREDITH, J. en C.

ATKINSON *vs* WALKER, *and* SINCENNES *et al.*, t. s.

Jugé: Qu'un tiers saisi, qui a été condamné sur une fausse déclaration par lui faite par erreur, peut être relevé de ce jugement, et qu'il doit lui être permis de faire une nouvelle déclaration, en payant les frais encourus depuis la déclaration fausse et erronée.

Le 14 octobre 1868, Wm. McNaughton, comme associé de la maison Sincennes et McNaughton, tiers saisis, déclara que la société avait en mains, appartenant au défendeur, la somme de $1879.13. Jugement intervint sur cette déclaration le 2 décembre 1868, condamnant les tiers saisis à payer au demandeur ladite somme, qui était moindre que le montant du jugement rendu contre le défendeur. Après la signification du jugement contre les tiers saisis, et par pur accident, Wm. McNaughton trouva, plié dans une police d'assurance, un transport notarié par le défendeur en faveur de T.-B. Prentiss, d'Aylmer, du montant que les tiers saisis lui devaient comme cautions de son débiteur, ce transport ayant été signifié non personnellement, mais à leur bureau d'affaires, à Montréal, avant la signification de la saisie-arrêt. La découverte de cette pièce conduit à une recherche minutieuse des causes qui avaient amené les tiers saisis en dette avec le défendeur, et, alors, les tiers saisis s'aperçoivent encore qu'une autre erreur avait été commise dans leur déclaration, et qu'au lieu d'avoir été les débiteurs du défendeur pour $1879.13, ils ne l'avaient été que pour environ $1200, en principal, intérêts et frais, le défendeur Walker ayant obtenu jugement à Aylmer contre son débiteur, pour le paiement duquel jugement les tiers saisis s'étaient portés cautions. Ils s'adressèrent alors à un juge de

la cour supérieure, pour obtenir la suspension de l'exécution du jugement, ce qui fut accordé le 4 janvier 1869, et, subséquemment, ils demandèrent à la cour, en terme, à Québec (la cause y étant pendante), de leur permettre de faire une nouvelle déclaration, accompagnant leur requête de leurs affidavits et de ceux de leurs commis, constatant lesdites erreurs, et, plus particulièrement, l'ignorance du transport en question, jusque vers la fin de décembre 1868, et, après la signification du jugement sur les tiers saisis. Le 15 février, la requête des tiers saisis fut admise par la cour, et ordre fut donné au demandeur de plaider au fond. Le demandeur a rencontré le mérite de la requête par une défense en droit, appuyée sur les raisons suivantes : " 1° Because the judgment rendered against the garnishees on the second day of December, 1868, was rendered against them upon their own declaration and in conformity thereto ; 2° Because the judgment was duly signified to them ; 3° Because the judgment is a final, and not an interlocutory judgment, and is susceptible of being appealed from, and cannot be reversed, except through an appeal or a *requête civile* ; 4° Because it is not alleged that any fraud or artifice has been made use of by plaintiff, or that said judgment has been rendered upon documents which have subsequently been discovered to be false, nor upon any unauthorized tender or consent disavowed after judgment, or that, since the said judgment was rendered, documents of a conclusive nature have been discovered which had been withheld or concealed by plaintiff ; 5° Because said judgment has not been rendered by default, but after appearance, upon the confession of the garnishees ; 6° Because errors, even of calculation, are no grounds for the reversal of a judgment rendered against a party, who has appeared and made an erroneous declaration or calculation, and the garnishee who commits an error is subrogated to the rights of him to whom the erroneous payment is made ; 7° Because this court has no jurisdiction to repeal or reverse the said judgment ; 8° Because the declaration made by the garnishees upon which the judgment was rendered against them was accepted by plaintiff, and the garnishees having made a declaration, by which they acknowledged themselves to be indebted in a certain amount to defendant, and judgment, at the instance of plaintiff, having been rendered against them, in conformity with such their declaration, they cannot be received to make a fresh declaration to modify or contradict the declaration in conformity with which they have been condemned ; it was the duty of the garnishees to have duly informed themselves of the state of their position with regard to defendant, before making their declaration, and they are bound to suffer such

loss as may be entailed upon them by their own fault and want of vigilance; 9° Because, when the garnishees confessed to plaintiff that they owed to defendant the sum mentioned in their declaration, plaintiff represented, *pro hac vice*, the defendant, as regards the garnishees, and accepted their confession, and obtained judgment thereon; 10° Because said judgment has been registered and entered in the archives of this Court, and cannot be altered, disturbed or reversed, except for some one or more of the causes, and in the mode prescribed by law, and that no cause sanctioned by law has been shown for the alteration or reversal of the same.

GIROUARD, pour les tiers saisis, soumit le mémoire suivant: Les requérants demandent à être relevés des conséquences de la déclaration faite par William McNaughton, l'un d'eux; et, pour motif de leur application, ils allèguent que cette déclaration a été faite par erreur; d'abord, erreur sur le montant entre leurs mains appartenant au défendeur, et, en second lieu, ignorance totale d'un transport de ce montant. Enfin, pour mieux faire voir leur bonne foi et leur volonté sincère de rencontrer les fins de la justice, ils ont produit une nouvelle déclaration et déposé la somme appartenant au défendeur ou à ses représentants, priant que cette déclaration, amendée suivant les faits, soit reçue. La justice du cas présenté par les requérants est incontestable et semble être admise par toutes les parties, mais on soutient qu'il est trop tard et que le tribunal ne peut venir à leur secours; et c'est sur cet unique point que les requérants soumettent les propositions et les autorités suivantes. Voyons d'abord quelle est la position des tiers saisis vis-à-vis du demandeur, puisqu'il s'agit d'un jugement rendu en sa faveur contre eux. Les tiers saisis ne sont pas des débiteurs du saisissant comme dans le cas d'une confession de jugement par un défendeur; ils n'ont jamais contracté avec le demandeur, et ce n'est que comme gardien judiciaire, comme séquestre des biens du saisi, qu'ils sont responsables, tant après qu'avant jugement. Ancien Pigeau, *Proc. Civile du Chatelet*, vol. 1, p. 656; Bourjon, *Droit Commun de la France*, vol. 2, p. 673; Guyot, v° *Saisie-Arrêt*; Pothier, *Proc. Civile*, partie 4, chap. 2, section 3, § 4, p. 235, édition Bugnet; Code de Proc. Civile du B.-C., arts 613, 616, 619 et 625. Suivant l'article 625: "Le jugement rendu sur la déclaration du tiers saisi équivaut à *une cession judiciaire, en faveur du saisissant, du titre de créance du saisi et opère subrogation.*" Mais, si cette déclaration est erronée, si le saisi n'a aucun titre de créance, ou, encore, si la chose saisie a péri depuis la déclaration, évidemment, il ne peut y avoir ni cession ni subrogation. Décider qu'il ne sera pas permis au tiers saisi de corriger son erreur, ou de faire

connaître cette perte, même après jugement, serait agir, non seulement contre l'esprit de la loi, mais, encore, contre sa disposition expresse qui ne paraît donner à un jugement contre un tiers saisi que les effets d'un jugement contre un gardien, c'est-à-dire d'une règle *nisi*. Aussi, le législateur a-t-il eu le soin de définir la nature de la cession produite par un jugement sur une déclaration de tiers saisi. Il déclare que cette cession est judiciaire, voulant dire par là même qu'elle ne peut avoir lieu que dans les termes de la loi. Or, nous l'avons dit, la condition *sine qua non* de cette cession, c'est l'existence de biens appartenant au saisi. Conséquemment, cette même loi non-seulement permet, mais commande même aux tribunaux d'annuler un jugement qui est intervenu en dehors de ses prévisions. Il n'y a certainement rien, dans notre Code de Procédure, qui défende cet acte d'administration d'une bonne justice; et, quand bien même il ne se trouverait, *dans ce Code, aucune règle applicable pour faire valoir le droit particulier des requérants, toute procédure adoptée qui n'est pas incompatible avec les dispositions de la loi ou de ce Code, doit être accueillie et valoir* (*Code de Proc. du B. C*, *art.* 21). Les tiers saisis ont adopté la procédure de la requête qui non seulement n'est pas incompatible avec la loi ou le code, mais est la forme la plus ordinaire et la plus naturelle d'une demande en justice. Comme nous l'avons vu, elle n'est pas non plus contraire à leur qualité de tiers saisis. C'est en vertu de ces principes de haute équité que, longtemps avant le Code, nos tribunaux relevaient les tiers saisis des conséquences d'une condamnation obtenue par défaut. *Tailhades* vs *Talon, et Fabre, T. S., cité par les Codificateurs sur l'article* 624; *Andrews* vs *Robertson*, 1 *Low. Can. Rep.*, p. 140 (1); *Roy* vs *Scott*, 3 *id.*, *p.* 80 (2). En effet, si la saisie-arrêt n'a pour but que d'arrêter les biens du saisi entre les mains d'un tiers, comment peut-on raisonnablement refuser la déclaration de ce tiers, même après jugement rendu par défaut, en offrant de payer les dommages, savoir les frais de la saisie-arrêt? Toutes ces décisions ne viennent-elles pas aussi au secours des requérants, qui ne demandent que l'application des mêmes principes. Mais, il y a plus; l'article 624 déclare: "Le tiers saisi qui ne fait " pas sa déclaration *de la manière ci-dessus prescrite*, est

(1) Le tiers saisi contre lequel jugement a été rendu par défaut, peut faire opposition à ce jugement devant la cour qui l'a prononcé et est recevable à faire sa déclaration même après qu'un bref d'exécution a été émis contre lui en vertu dudit jugement, en payant les frais encourus jusqu'au jour de sa déclaration. (*Andrews* et *Robertson*, C. S., Québec, 11 février 1851, BOWEN, J. en C., et MEREDITH, J., 1 D. T. B. C., p. 140)

(2) Le tiers saisi est recevable à faire sa déclaration après jugement rendu contre lui par défaut, en payant tous les frais jusqu'au jour de sa déclaration. (*Roy* vs *Scott*, et *Lemesurier et al.*, t. s. et req., C. S., Montréal, 15 décembre 1852, DAY, J., VANFELSON, J., MONDELET, J., 3 D. T. B. C., p. 80)

" condamné comme débiteur personnel du saisissant au paie-
" ment de la créance de ce dernier. Il est néanmoins recevable
" en tout temps à faire sa déclaration, même après jugement,
" en payant toutes les dépens encourus sur la saisie-arrêt."
Remarquons bien qu'aux termes de cet article, non seulement le tiers saisi qui n'a fait aucune déclaration peut la faire après jugement, mais peut pareillement la faire celui qui en a fait une contre les dispositions de la loi. "Le tiers saisi," y est-il dit, "qui ne fait pas sa déclaration *de la manière ci-dessus prescrite*.... Il est néanmoins recevable en tout temps à faire sa déclaration," c'est-à-dire "*en la manière ci-dessus prescrite.*" Il est clair que celui qui, par erreur, ou même par sa faute, déclare qu'il a des biens appartenant au défendeur, tandis qu'il n'a rien en mains, ne fait pas une déclaration *en la manière indiquée par le Code de Procédure.* Le bref de saisie aussi bien que les articles 613 et 619 ordonnent aux tiers saisis de *déclarer sous serment quels effets ils ont appartenant au défendeur, et quelles sommes de deniers ou autres choses ils lui doivent ou auront à lui payer.* En d'autres mots, la déclaration du tiers saisi est la révélation exacte qu'il fait des sommes ou des objets dont il est débiteur envers le saisi. 6 Bioche, *Dict. de Proc. Civile, v° Saisie-arrêt, n°* 154, p. 40. La déclaration erronnée et fausse qu'il est dû au défendeur est donc contre l'essence même d'une déclaration de tiers saisi. Si le transport produit par les requérants est valable, et si M. Aylen a distraction de frais, il n'est rien dû au défendeur. Le Code, art. 619, comme le Code Français de Procédure, veut que le tiers saisi dénonce, dans sa déclaration, les autres saisies-arrêts existantes; mais tous les deux gardent le silence à propos de la dénonciation des transports signifiés. Néanmoins, la jurisprudence française, d'accord sur ce point avec l'ancien droit, l'exige aussi rigoureusement que celles des saisies-arrêts; et la raison en est si claire qu'il est inutile de l'énoncer. 10 Pothier, *Proc. Civile*, édition Bugnet, ch. 2, section 3, §3, p. 233. La déclaration a encore violé les dispositions de la loi à l'égard de cette formalité, et, aussi, a l'égard de la cause de la dette qu'elle ne revèle pas (article 619), ce qui a été la cause de l'erreur sur le montant du jugement. Leur déclaration n'a donc pas été faite de la manière indiquée ci-dessus; ils sont dans le cas prévu par l'article 624; et cela est tellement vrai qu'ils ont été condamnés *au paiement de la créance du demandeur*, c'est-à-dire pour plus que le montant déclaré; ils sont donc recevables aujourd'hui à faire leur déclaration *en la manière indiquée par la loi*; et c'est ce qu'ils demandent par leur requête, suivant la pratique ordinairement suivie pour faire relever un tiers saisi condamné par défaut, en offrant de payer les frais encourus sur la saisie-arrêt, et en les consignant en

justice, sauf à parfaire. L'esprit comme le texte de notre Code paraissent aux requérants si concluants en leur faveur qu'il n'est peut-être pas nécessaire de recourir à des précédents sur le cas même; mais, pour mieux faire voir la justice de leur cause et la légalité de leur procédure, ils ont consulté, non pas la jurisprudence du pays (car il ne paraît pas que la question y ait jamais été soulevée), mais celle de la France, sous un Code de Procédure ayant, sur la matière qui nous occupe, à peu près toutes les dispositions que l'on retrouve dans le nôtre (voir Code de Proc. Français, arts 572-577). En France, donc, non-seulement le tiers saisi en défaut est toujours recevable à offrir sa déclaration, mais l'est encore celui qui a déclaré par erreur; il lui est en tout temps permis d'amender et parfaire sa déclaration, en payant les frais du jugement sur la saisie-arrêt. En voici un exemple remarquable: Un tiers saisi s'était borné à déclarer que loin d'être débiteur, il était créancier du saisi. Cette déclaration est jugée insuffisante, comme ne contenant pas les détails ordonnés par le Code de Procédure, et le tiers saisi est condamné à payer la créance du demandeur. Appel de la part de ce dernier, qui offre en même temps une nouvelle déclaration suivant les faits; et son offre est acceptée en payant les frais. "Attendu," dit l'arrêt, "que les décla-" rations affirmatives faites en première instance étaient in-" complètes, en ce que les tiers saisis, ayant été en jouissance " du domaine, devaient présenter un compte détaillé; mais, " attendu que la déclaration du 5 juillet renferme les détails " exigés par le Code de Procédure, *et que le tiers saisi est tou-" jours à temps de réparer ses omissions, sauf à supporter les " dépens jusqu'au jour de la déclaration valable*, etc." Cet arrêt de la Cour Impériale de Paris est en date du 12 mars 1811, et est rapporté dans Sirey, ans 1809-1811, partie 2, p. 443. Sirey observe, en note sur cet arrêt: "La jurisprudence " s'est fixée en ce sens que, tant qu'il n'est pas intervenu de " jugement définitif (c'est-à-dire en dernier ressort, non sus-" ceptible d'appel et ayant autorité de chose jugée), le tiers " saisi est admis à faire sa déclaration ou régulariser celle qu'il " a précédemment faite." *Dalloz*, ancienne édition, *v° Saisie arrêt*, p. 638, *en note; Saint-Prix, Proc. Civile*, p. 520; *Souquet, Dict. de Droit et Proc., vol.* 2, *v° Saisie-arrêt, tableau* 633, colonnes 4 et 5, *où un grand nombre d'autres arrêts sont aussi cités; Carré et Chaureau, Proc. Civile*, édition de 1842, *vol.* 4, p. 638, *etc.*; *Bioche, Journal de Proc. Civile, vol.* 14, p. 378, rapporte un arrêt de la Cour de Lyon du 3 avril 1848, où un tiers saisi, condamné par défaut, fut autorisé, en appel, à faire sa déclaration, bien qu'il eût déjà fait opposition au jugement, qui le condamnait, sur son offre de déclarer, offre qui ne fut jamais exécutée et qui fut, par conséquent, suivie du renvoi

de l'opposition. *Bioche, Dict. de Droit et Proc., v° Saisie-arrêt, n°* 156, dit à ce sujet: "La déchéance de l'article 577 " ne serait cependant pas prononcée contre le tiers saisi qui " ferait seulement une déclaration inexacte ou incomplète; " il ne serait condamné qu'à payer la somme qu'il serait jugé " devoir, plus des dommages-intérêts, le cas échéant." Puis il cite un arrêt de Bordeaux, 6 avril 1830. *Roger, Traité de la Saisie-arrêt*, p. 570, n° 557: "Même après jugement soit par " défaut, soit contradictoire, qui l'a déclaré débiteur pur et " simple des causes de la saisie, le tiers saisi peut encore faire " sa déclaration dans les délais de l'opposition, ou même sur " l'appel. Tant que la décision qui le condamne n'a pas acquis " l'autorité de la chose jugée, sa déclaration est encore receva- " ble; il peut, au moyen de l'opposition ou de l'appel, la pro- " duire utilement et faire considérer comme non avenue la dé- " chéance prononcée contre lui." Comme notre Code, le Code Français, exige la dénonciation des saisies-arrêts signifiées au temps de la déclaration. Néanmoins, les auteurs et la jurisprudence maintiennent qu'après jugement, le tiers saisi, qui a oublié ou négligé de révéler l'existence de ces saisies, est reçu à compléter et amender sa déclaration, en payant les frais du jugement. *Carré et Chauveau, Proc Civile, vol.* 4, p. 638; *Thomine-Desmazures, Code de Proc. Civile, t.* 2, p. 81; Pasicrisie Belge, an 1826, p. 287, *Bruxelles*, 16 Novembre 1826. Si le tiers saisi est recevable, même après jugement, à dénoncer les saisies-arrêts existantes, comment peut-on logiquement l'empêcher de révéler le fait de la signification d'un transport, surtout lorsque cette signification était inconnue de lui. La saisie-arrêt et le transport signifié n'ont-ils pas tous deux l'effet de déposséder le débiteur de la somme due, pour en saisir, dans un cas, la justice au profit du saisissant, et, dans l'autre, le cessionnaire. Aussi, les auteurs et la jurisprudence ont-ils assimilé le cas de défaut de dénonciation de transport à celui de dénonciation des saisies existantes. *Pigeau*, édition de 1808, *vol.* 2, p. 67: "S'il y a eu des transports signifiés au tiers " saisi avant sa déclaration, il doit les faire connaître quoique " le Code ne l'exige pas. En effet, ou la signification est " antérieure à la saisie, ou elle est postérieure. Si elle est " antérieure, et qu'il n'en donnât pas connaissance, il recon- " naîtrait qu'il doit toujours directement au saisi; que la " saisie faite sur celui-ci est valable; *et s'il ne dénonçait ce " transport qu'après, il serait passible de tous les frais qu'au- " rait occasionnés son retard.*" Dans la Louisiane, où la saisie-arrêt est soumise aux mêmes règles qu'en France et en Bas-Canada, les tiers saisis sont toujours relevés des jugements rendus sur des déclarations erronnées. Les *Louisiana Reports*, vol. 13, p. 465, nous en offrent un cas remarquable. Les tiers

saisis avaient déclaré qu'ils avaient "104 bales of cotton," sans dénoncer les saisies antérieures. Jugement intervint sur cette déclaration, et il leur fut, après, permis de réparer leur oubli. Ce jugement est de la Cour d'Appel de la Nouvelle-Orléans. Le juge Eustis différa de la majorité de la Cour, parce que les tiers saisis connaissaient les saisies existantes au moment de leur déclaration. "I do not wish," a-t-il cependant dit, entre autres choses, "to be understood that there may not be cases "in which a garnishee would not be relieved from the conse-"quences of an erroneous answer; but, in this case, I consider "the garnishees have no claims whatever to relief, as the "matter stands before us. If *error*, fraud, violence, or the "loss of the property attached *had been urged on behalf of* "*the garnishees*, a different case would have been presented; "but the only fact for which they claim an exemption from "the operation of their judicial confession, they knew at the "time of making it as well as they do now, and neglected to "disclose it in their answers." Enfin, supposons même que tout ce que nous venons de dire serait insuffisant pour faire relever les tiers saisis de la condamnation prononcée contre eux. Comme on a dû le remarquer, toute la jurisprudence que nous venons d'indiquer consiste à permettre la réparation de purs oublis ou négligences de la part des tiers saisis. Mais, dans le cas actuel, il n'y a rien de cela. Le fait de la signification du transport, aussi bien que le montant réellement appartenant à James Walker, n'ont été connus que par accident, après la signification du jugement sur les tiers saisis; il y a donc lieu à la requête civile. "*Les jugements*," dit l'article 505 de notre Code, "*qui ne sont pas susceptibles d'appel ou d'opposition*, "*tel qu'expliqué plus haut, peuvent être rétractés sur requête* "*présentée au tribunal*," etc. Le jugement rendu contre les tiers saisis n'est pas susceptible d'opposition, aux termes des articles 483 et suivants, ni d'appel ou revision (par le mot "appel" l'article 505 entend l'appel à la Cour de Revision) dans le sens des articles 494 et suivants, compris dans l'article 505. Les articles 483 et suivants ne pourvoient pas au cas de saisie-arrêt signifiée personnellement, et, évidemment, l'article 494 n'a rapport qu'à la revision des causes complètes dans lesquelles aucun fait nouveau ne peut être introduit. Il y a lieu à la requête civile "si le jugement a été rendu sur pièces "dont la fausseté a été découverte que depuis, ou sur des "offres ou consentements non autorisés et qui ont été désa-"voués après jugement." (Art. 505). Le jugement contre les tiers saisis a été rendu sur une déclaration qui a été trouvée et prouvée fausse depuis la signification du jugement, par la découverte du transport de la même créance, et la connaissance de véritable position des tiers saisis vis-à-vis du défendeur. Il

semble aux requérants que c'est précisément l'un des cas de la requête civile. On pourrait peut-être ajouter ici que ce jugement a été rendu sur un consentement non autorisé et qui a été désavoué par la requête. William McNaughton, comme membre de la maison Sincennes et McNaughton, avait-il autorisation suffisante pour faire la déclaration ? Cet acte n'est-il pas au-delà des pouvoirs que la loi suppose chez un associé ? N'est-il pas en dehors du cours ordinaire des affaires pour lesquelles la société a été formée ? Les requérants n'insistent pas plus longtemps sur ce que leur cas est un de ceux de la requête civile ; il vient certainement sous l'article 624 ; à tous évènements, ils ont confiance qu'ils obtiendront justice ; et, s'ils ne l'obtiennent pas, ce sera certainement le cas de dire, *summum jus, summa injuria ;* car il ne leur restera pas d'autre expédient que celui de payer deux fois le même montant, et encore dans une affaire où ils n'ont aucun intérêt personnel.

Colston représenta les tiers saisis à l'argument et cita, en outre, les autorités suivantes : *Code Civil*, art. 1245 ; *Arrêt* du 28 mai 1841, 33 Dalloz, *Rép. de Jur.*, p. 1133, note ; 33 Dalloz, p. 1206, n° 5528.

Ross, pour le demandeur, soumit les propositions et autorités suivantes : 16 Merlin, *Rép. de Jur.*, v° *Jugement*, § 3, n° 4, p. 187 : " A l'égard des jugements définitifs, la règle générale est qu'ils ne peuvent pas être reformés par les juges qui les ont rendus : *Judex posteà quam semel sententiam dixit, posteà judex esse desinit. Et hoc jure utimur ut judex qui semel vel pluris vel minoris condemnavit, amplius corrigere sententiam suam, non possit : semel enim malè seu benè officio functus est.* Loi 55 D. *De re judicata.*" La jurisprudence des arrêts a toujours été conforme à ces lois. Papon, liv. 6, tit. 2, n° 27, dit qu'un arrêt du Parlement de Paris du 17 décembre 1555, a jugé qu'après qu'une sentence est signée et mise au greffe, le juge ne peut plus la retirer pour y ajouter ou diminuer, *qu'il a les mains liées.* Bouvot, tome 2, au mot *sentence*, quest. 3, fait mention d'un arrêt du Parlement de Dijon du 17 mai 1605, qui décida que *le juge ne peut corriger une sentence définitive.* Part. 1, tit. 4, chap. 18, il dit que, par arrêt du Parlement de Paris, du 26 juillet 1608, il a été " fait inhibitions et défenses aux lieutenant-généraux et autres juges des sièges de ce ressort de donner aucune sentence contraire à celles qui seraient intervenues sur les procès et différends pendants en leurs dits siéges, ni ordonner sur requête à eux présentée ou verbalement faite sur séance d'exécuter lesdites sentences ou jugements.... sauf aux parties à se pourvoir par appel à la Cour pour leur être fait droit ainsi que de raison." Ord. de 1667, tit. 35, art. 1 (18 Isambert, *Anciennes Lois Françaises*, p. 174) :

"Les arrêts et jugements en dernier ressort ne pourront être rétractés que par lettres en forme de requête civile, à l'égard de ceux qui aient été parties ou dûment appelés, et de leurs héritiers, successeurs ou ayants cause." Recueil de Jurisp., R. de la Combe, *verbo* "Erreur," p. 363, n° 2: "Erreur de calcul ne se couvre point, quoique l'on ait compté plusieurs fois, s'il n'y a eu jugement ou transaction sur cette erreur," et il cite Despeisses, *Des Contrats*, tome 1, partie 4, section 5, n° 5, page 466, qui dit, vers le milieu de la page, 2e colonne: "Néanmoins l'erreur de calcul peut être réparée même après dix ou vingt ans, *Leg. calculi. 8 ff. Administrat. rer. ad civit*, et dans 30 ans, *Accurs. in dict. leg.* 8, *Quia veritas errore non vitiatur, l.* 6, § 1 *ff. De off. Praesid., sinon qu'il y ait eu arrêt sur ladite erreur, dict. leg. un C. de error. calcul.* Car alors la chose adjugée étant tenue pour vérité, *leg. res judicata, ff. de reg. jur., on s'en doit tenir à ce qui est jugé.*" Bioche, Dict. de Proc., vol. 6, page 41, n° 158: "Le tiers saisi qui, déclaré débiteur pur et simple, a payé plus qu'il ne devait, ou qui, s'étant indûment dessaisi, a été obligé de payer deux fois, est subrogé aux droits de celui qu'il a payé." Dalloz, Répertoire de Jurisprudence, tom. 39, *verbo* Saisie-arrêt, page 539, n° 339; "Toutefois, une déclaration faite dans une autre forme que celle tracée par la loi, n'aurait pas moins pour effet de lier le tiers-saisi vis-à-vis du saisissant, *surtout si elle était acceptée* par ce dernier. Ainsi, il a été jugé que lorsqu'un tiers saisi fait, sur le procès-verbal de saisie, une déclaration qu'il signe et par laquelle il se reconnaît débiteur du saisi, il n'est plus recevable ensuite à contredire cet aveu en soutenant qu'il est libéré." *Corpus Juris Civilis*, lib. 50, tit. 17, n° 203. "*Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.*" *Idem*, n° 207: "*Res judicata pro veritate accipitur.*" *Idem*, lib. 42, tit. 8, lex. 24, p. 144: "*Jus civile vigilantibus scriptum est; ideo (quoque) non revocatum, id, quod percepi.*" *Vigilantibus non dormientibus subvenit lex.*

"The Court, considering that garnishees are not parties to the suit in which they are required to appear, but are compelled, under the authority of the court, and for the advantage of the suitors, in the case in which the garnishees are summoned, to act as guardians of any property seized in their hands, and, therefore, that the rules of law which apply to judgments rendered between the parties to a suit do not apply as to orders or judgments made with respect to garnishees, who are not such parties; and considering that the allegations, as to matters of fact contained in the petition of the garnishees, are not denied by plaintiff and are proved by the affidavits filed, and that, under the circumstances of the present case, it would be unreasonable and unjust to compel

the garnishees to pay the sum of eight hundred and eighty one dollars, with interest and costs, mentioned in the judgment, solely on account of an involuntary and blameless mistake on their part, in the course of proceedings forced upon them without their consent, at the instance and for the benefit of the party who now seeks to take advantage of the mistake; it is, in consequence, considered and adjudged that the garnishees may, within fifteen days from the service upon them of this judgment, make a new declaration according to the facts of the case; on this condition, however, that, within eight days from the service upon the garnishees of a copy of this judgment, they pay to plaintiff all the costs to which he has been subjected by reason of the making of the declaration which the garnishees now represent as erroneous; and, in default of the said costs being paid within the delay aforesaid, then the permission hereby granted to them shall cease to have any force or effect; and the court doth reserve to pronounce hereafter upon the remainder of the conclusions of the petition of the garnishees. (14 *J.*, p. 60)

D. GIROUARD, avocat des tiers saisis.

CASAULT, LANGLOIS, ANGERS and COLSTON, conseils.

ROSS, avocat du demandeur.

INSURANCE AGAINST FIRE.—JURY TRIAL.

SUPERIOR COURT, Montreal, 17th December, 1869.

Coram MACKAY, J.

ROLLAND *vs* THE NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

Held: 1. That an insurance of goods described as being in nos 317, 319, St. Paul Street, does not cover goods in the premises n° 315 adjoining.

2. The verdict of a jury will be set aside for misdirection on the part of the judge, or if contrary to the evidence at the trial.

This was a motion for a new trial, in a case tried by a special jury before MONDELET, J., for the following reasons: 1st Because the verdict is contrary to the evidence; 3rd Because plaintiff's total loss, in the premises mentioned in the policy, was proved to be only $1,346.13, whilst the verdict finds it at $35,102.90; 4th Because the jury considered and valued the goods and effects in n° 315 St. Paul Street, the house adjoining the building described in the policy, plaintiff's exhibit n° 1; 5th Because the learned judge presiding

at the trial admitted illegal evidence, to wit: of the destruction of and value of goods of plaintiff in n° 315, and this was considered by the jury; 6th Because the judge also instructed the jury, telling them that they might look at surrounding circumstances, in order to get at the intention of the parties to insure the goods in n° 315, the policy covering goods only in 317 and 319; 7th Because the verdict is defective and incomplete, particularly the answer to the ninth question, the total losses not being stated, and no distinction being made between the loss of sewing machines and that of tools, &c.

MACKAY, J.: In October, 1868, plaintiff instituted an action against defendants, for the recovery of $6,000, amount insured under a policy granted by them, covering $4,000, on boots, shoes, leather and findings, in a three-story stone and gravel roofed building, n°s 317 and 319, St. Paul Street, Montreal, and $2,000, on sewing machines and tools therein. The insurance was from 20th February, 1868, to 20th February, 1869. On the 21st March, 1868, a fire happened and the building mentioned in the policy was partly destroyed, and, says plaintiff's declaration, "the stock in trade, sewing machines and tools therein described and covered by said policy, then contained in the said building, of great value, to wit: exceeding $35,000, were damaged and destroyed, whereby plaintiff sustained damage to an extent far exceeding $4,000 in boots, shoes, leather and findings, and exceeding $2,000 in sewing machines and tools likewise contained therein. All notices were given (it is said) and defendants are liable." Conclusions for the whole sum insured, $6,000, and for a trial by jury. The defendants pleaded, firstly, that, before and at the date of the policy, plaintiff informed defendants, that he had, previous to date of policy insured the same articles for $6,000 in the Citizens' Insurance Company; for $12,000 in the Scottish Provincial Company, and for $4,000 in the Commercial Union; that the policy which plaintiff held was subject to the condition that, in case of other insurances, defendants should be liable only for a rateable proportion of any loss suffered by plaintiff. The defendants recite the plaintiff's other insurances, for instance, for $4,000, with the Commercial Union: on stock, boots, shoes, leather and findings, including sewing machines, and so with the Scottish Provincial Company. The insurance with the Citizen's Company does not mention "sewing machines." The plea goes on to say that all plaintiff's loss, by fire, in n°s 317 and 319, St. Paul Street, was $1346.13. $331.07 was all that rateably, under the conditions of their policy, defendants had to pay, and that, on the 18th June, 1868, this amount had been tendered and refused. The plea repeats this tender and concludes for the dismissal

of plaintiff's action for any amount beyond it. From the evidence, it appears that the insurance by plaintiff was effected through defendants' agent Fauteux. Fauteux seems to have been beating about for business, visiting frequently at Rolland's place, on St. Paul Street. He solicited the insurance and gave the receipt for the premium, after which the policy was issued. The subjects insured were goods, boots, shoes, sewing machines, &c., contained in the building 317-19, St. Paul Street (meaning 317 and 319 St. Paul Street). This building, the property of Rolland, had two doors of entrance on St. Paul Street, n° 317 being for plaintiff's office and warehouse, and 319 for the workmen's entrance. Next to this building (n° 315) was a house owned by one Jodoin and occupied by Coghlan. Rolland, in December, 1867, leased from Coghlan the third story of this n° 315 and pierced a door of communication between it and his establishment, in the house n°s 317-319. Rolland had no use of the entrance to 315 from St. Paul Street. Coghlan alone used it. Without going to the third story of Rolland's house, nobody could see any communication between said 317 and 319 and the third story of said 315 that Rolland had leased from Coghlan. It is not proved that Fauteux knew of Rolland's having added these apartments to his establishment. "*Il aurait dû en avoir entendu parler*," says the witness Laurin; yet, it is not proved that he did know, or that any person did speak to him of it. It is not proved that he ever was, after 1866, in the third story of Rolland's house 317 and 319. It is doubtful if he was even in the second after 1866, and, then, there was no opening at all communicating with apartments in n° 315. The fire originated in n° 315 (Coghlan's). What Rolland had in 317 and 319 was damaged only by water and smoke, caused by the fire in Coghlan's. The apartments in 315 are spoken of in various ways by plaintiff's witnesses, principally with a view to establish what is a fact, that they were part of the establishment of Rolland Rolland was dreadful loser by the fire of March, and we have, under his own hand, a statement of his loss exactly. He lost $1,346.13 in the building 317 and 319, he lost more than $33,000 in the part of the building leased from Coghlan, 315. On 16th February, 1867, plaintiff had insured with the Citizens' Insurance Company on goods and stock in 317, and, on 15th March, he had insured with the Lancashire on goods in 317, but none of these policies mentioned 315 or any part of it. The learned judge who presided at the trial reports that, in charging the jury, he told them that, with respect to the question whether plaintiff had, or had not, insured the stock in two apartments on the third and fourth flats, connected with and forming part

of his establishment, and which he proved he had been in possession of sometime previously to and at the time of the insurance effected with defendants, there were circumstances which the jury might call to their assistance, if required, to enable them to arrive at a conclusion one way or other ; such as, for instance, the consideration whether plaintiff would have been so imprudent or so insane as to neglect to insure the valuable stock he had in the two apartments over n° 315, if they, in fact, formed part of his establishment. "I added," says the learned judge, "that such circumstances did not prove that defendants and plaintiff had actually had the intention of effecting an insurance on the stock in those apartments. It was for the jury to decide whether those apartments were a part of plaintiff's establishment, and for the jury alone." In answer to the question : "Was the property of plaintiff then being in the said premises and firstly mentioned in the said policy, consisting of boots, shoes, leather and findings, injured or destroyed by the said fire, and if so, of what value was the same and at what amount do you estimate the damage and loss thereto caused by the fire?" The jury have found : "Yes, it was injured and destroyed, damage and loss $35,112.90." In answer to the question : "Were the sewing machines and tools, the property of plaintiff then being in the said premises, and secondly mentioned in the said policy, also injured or destroyed by the said fire, and if so, of what value were the sewing machines, and of what value the tools, and at what amount do you estimate the damage and loss caused by the fire to the said sewing machines and to said tools ?" The jury find : "Yes, injured and destroyed, loss and damage, $230.55." One juror dissented from paying on goods in n° 315. The defendants objected at the trial to part of the judge's charge, wherein (say defendants) the jury was referred to the surrounding circumstances, in order to explain the policy of insurance, and the intention of the parties (plaintiff and defendants), in insuring, and to ascertain whether the contents of the two apartments or flats above Coghlan's in n° 315, were insured under the said policy. (The Hon. Judge here read the reasons already stated). At the argument on this motion, defendants complained that they were having fastened upon them obligations never assumed by them ; that, whereas, plaintiff had not even declared upon any loss in n° 315, and had not insured any property in it, evidence was admitted as to loss by plaintiff there, and the jury was directed that they might consider what Rolland had there, if the things were part of his establishment; that the jury thereupon found Rolland's loss therein, improperly returned it as loss in the premises mentioned

in defendants' policy granted to plaintiff, making an untrue finding, indirectly condemning defendants to pay for a loss that they had never contracted to pay for. For plaintiff it was said that Fauteux, defendants' agent, knew all about Rolland's place in Saint-Paul street; that all the stock in trade and property in Rolland's establishment there was meant to be insured; that the description was defendants', and the policy ought to be interpreted against defendants; that it might be interpreted, and in fact required interpretation to enable us to get at what was or is meant by the number "19" as the number of the building referred to in the policy (the policy reading 317-19; that the risk was not greater by Rolland's having had in use part of 315, &c. The treatises say that it is of the essence of the contract of insurance of moveables, that the things and their position should be known and understood by both parties; that the place in which goods are is always a *motif déterminant* of or for the contract. It is never indifferent to the insurer to have it properly stated. When goods are insured in a building, there ought to be communicated to the insurer all information to enable him to appreciate the risk; for instance, of what materials the building is, its situation, distance from other buildings, whether connected with others and so forth. There must be perfect understanding as to the subject insured, else there can be no true *convention. Corrélation de volonté* is absolutely required to operate a contract. But, if both parties have agreed upon the substance, if the insurer know what he is taking risk upon, a mere inaccuracy of description may not hurt. In the present case, for instance, the policy describes the goods insured as in building n°s 317-19 Saint-Paul street. This is an inaccuracy and so the building 317-319 will be held to be meant. Rolland had but one building, the *volonté* of the parties was concerning it and not concerning "19" in which Rolland had no interest. But from this we must not go off to allow the plain words of a written contract, that in their strict sense can be carried into effect, to be explained away or extended by parole testimony. In the present case, for instance, the building, *locus in quo*, of the goods insured is so plainly described that there is no doubt about it. It is Rolland's building, not Jodoin's. Suppose Rolland had sold his building by the very same description, surely nothing would have passed of 315. As said before, the Court does not see that Fauteux knew all about Rolland's establishment. It does not believe he ever saw or knew of the communication between 317 and 315. When was he informed of it? Rolland seems to have been so imprudent as not to inform the other Insurance Companies of it. The communication had existed

but for a short time before the insurance with defendants, perhaps two months. Is it proved that, at any time after the communication was made, Fauteux had been up-stairs at Rolland's? Would any man have supposed a communication such as described in this case to have been made in the *mitoyen* wall between Rolland and Jodoin? But suppose that Fauteux did know of the communication and that Rolland had rooms in Jodoin's house, 315, it would not follow that necessarily 315 was insured or meant to be so. Suppose that Fauteux and defendants knew where Rolland kept all his goods, and that some were in Jodoin's building, 315, does it follow that, therefore, those in 315 were insured; that defendants insuring 317 and 319 are to pay also for the goods in 315? According to Rolland, though the fire had burned nothing but 315 and what was in it defendant would have to pay for it, under their covenant in this policy covering goods in a particular building named 317 and 319. But this would be to maltreat all principle and justice. "The subject insured was the establishment with its appurtenances," says Rolland's counsel. The policy reads not so, but that the goods, stock, machines and tools in the building n°s 317 and 319 are insured. This building was the property of Rolland, while 315 belonged to Jodoin. Between the two, the presumption of law is that a dead wall exists. The plaintiff's declaration recites cause of action from policy covering property in building n°s 317 and 319. It states plaintiff's loss to be from destruction therein of his goods and machines; in respect of nothing else is the condemnation of the defendant sought. Not one word is there of n° 315, nor a word complaining of the policy as mis-describing or erroneously describing the place in which the goods insured were contained. It was said at the argument that the description in the policy was the defendants,' and to be interpreted against them. Allow that the description is the defendants,' it is not obscure: it cannot be interpreted to mean two buildings, mentioning only one. They wrote a plain limitation. It was lawful to do so. An Insurance Company may insure a flat of a house, or goods in it, or goods in a wing of a house. So if a man own a store comprised of three or ten houses upon a street. any one of these may be the subject of insurance. If he insured only one, in vain would he ask the insurers to pay for any of the others, if destroyed, and it would be quite indifferent that all were connected together and used in the one trade or made up the one establishment of the assured. There are not degrees of exclusiveness in insurance. The place described is insured. What is outside of it is excluded, and there is no difference between ten feet of distance and a mile from the place covered. Nothing is

covered that is not included. If a man mean to insure his "establishment" let him do so *eo nomine*, and all that belongs to it will be covered. It was said that the risk was not greater from Rolland's using 315. The facts of the case refute this argument conclusively. But supposing that no increase of risk was present, it does not follow that, therefore, the goods lost in 315 were to be paid for by the defendants. Let us refer again to the motion for a new trial. It is repeatedly said that the application for new trial is a direct appeal to the justice and laws of the country. Misdirection to the jury by the learned judge, who presided at the trial, is the principal complaint of defendants. That the verdict is contrary to the evidence is another. The learned judge charged as already stated. I say it with some diffidence, but, in my opinion, the charge of the learned judge ought not to be supported. There ought not to have been allowed questions, indirectly even, as to whether plaintiff had insured the stock in the two apartments in 315. It was not properly matter for consideration whether the plaintiff would have been so imprudent as to neglect insuring his stock in 315. It was not correct, in my opinion, to charge that it was for the jury to decide whether those apartments were part of the plaintiff's establishments. The jury had properly nothing to return about 315. It is clear that under the directions received by them they have valued the goods lost in 315. All the jurors but one are for making defendants pay for the goods in 315. The jury have found a verdict contrary to the evidence, namely that in the premises mentioned in defendants' policy, the plaintiff's loss was $35,-112.90. The plaintiff, himself, in his claim writes this down as not the case. $33,766.77 is reported by him as lost in 315.

"Considering that there was misdirection of the jury on matters material; considering the verdict to be contrary to the evidence upon the points of loss and value; considering, further, some of the findings defective and unclear, for instance the ninth and the fourth findings, the Court has to grant defendants' motion. The verdict is set aside and motion for a new trial granted." (14 *J.*, p. 69)

CARTIER, POMINVILLE and BÉTOURNAY, for plaintiff.

EDWARD CARTER, Q. C., Counsel.

WM. H. KERR, for defendant.

EVIDENCE.

COURT OF REVIEW, Montreal, 30th December 1869.

Coram MONDELET, J., BERTHELOT, J., MACKAY, J.

MILLER *vs* KEMP, *and* J. C. BAKER *et al.*, tiers saisis, *and* LEVI KEMP, contesting, *and* JESSE THAYER, intervening, *and* LINUS O. THAYER *et al.*, reprenants l'instance.

Held: That verbal evidence is inadmissible to prove payment of a debt due under a judgment, although the debt were originally of a commercial nature.

A *saisie-arrêt* was issued on the 16th September, 1864, upon a judgment rendered on the 18th February, 1843, and, under it, a considerable sum of money was attached in the hands of the *tiers saisis*. The defendant appeared on the return of the writ, and, afterwards, contested the attachment, alleging, in effect, that the amount due under the judgment had been transferred by plaintiff to Jesse Thayer, pending the suit, and that after the rendering of judgment, the whole amount of debt, interest and costs had been paid to Thayer by defendant. Thayer intervened in the cause, praying to be declared proprietor of the judgment, under the deed of transfer referred to. Issue was joined on defendant's contestation, Thayer specially denying the alleged fact of payment. On a copy of the transfer being produced, it was ascertained that the sum transferred was £88 7 7, leaving a small balance of debt and the costs of suit not included in transfer. A retraxit was thereupon filed by Thayer, reducing his demand to the sum transferred and interest. At the *enquête*, Thayer was examined as a witness on behalf of defendant. He denied positively that any part of the judgment had ever been paid to him. G.-L. Kemp, defendant's son, was examined. He stated that he had been sent into town by his father, a few days after the rendering of the judgment, and that he had then and there paid Thayer the amount transferred, and had paid the costs of suit and balance of debt and interest to plaintiff or to his attorneys, Fisher and Smith; that he had taken receipts from Thayer and from plaintiff, or Fisher and Smith, for the amounts paid to them respectively and had given them to his father on his return home. A part of the amount required, he said, had been previously borrowed by his father on a joint promissory note for £100, signed by himself and one or two others as sureties. The examination of this witness was objected to by Thayer, on the ground that verbal evidence could not be adduced, to prove payment of a debt due

under a judgment. A.-L. Baker, defendant's brother-in-law, remembered that a sum of £100 had been borrowed by defendant for the purpose, as witness was informed, of paying off Miller's judgment. He had no personal knowledge of the payment. After the closing of G.-L. Kemp's deposition, two papers were produced by defendant as having been discovered in the interval, one being a statement of debt, interest and costs, with £88 7 7 deducted, as transferred to Thayer, and a receipt below by Fisher and Smith, dated 3rd April, 1843, for £22 16 0 on account; the other being a letter from Fisher and Smith to defendant, dated 12 February, 1845, acknowledging receipt of balance of £2 6 3½. Judge Smith, examined on behalf of intervening party, proved the receipt and letter to be in the handwriting of his partner, the late D. Fisher, and that he and his partner had acted merely as the attorneys of Miller, and not of Thayer; he knew nothing as to any payment made to Thayer. At the hearing of the cause, before Mr Justice Monk, the intervening party moved to reject the evidence of G.-L. Kemp. This motion was granted, and judgment rendered, dismissing the contestation filed by defendant.

At the hearing in review, ROBERTSON, for defendant, contended that the question was one of proof. From the receipt and letter produced, signed by Fisher and Smith, coupled with the depositions of G.-L. Kemp and A.-L. Baker, it sufficiently appeared that, shortly after the rendering of the judgment of 18th February, 1843, the amount of it was paid, less the balance of £2 6 3½, acknowledged as paid by the letter of 12th February, 1845. It was very unlikely, when defendant was proved to have been always a man of considerable means; that, from 1843 to 1864, no steps should have been taken to enforce payment of the judgment if it had remained due. The receipt taken by G.-L. Kemp from Thayer, it is true, was not forthcoming, but from the great lapse of time, it might fairly be presumed to have been lost. The evidence by parol testimony, he submitted, was properly adduced, and the proof of payment, all that could reasonably be expected after the lapse of upwards of years. The *cessionnaire* Thayer would appear, without explanation of any kind, to have remained perfectly quiet during all this period, without troubling the defendant, or asking payment from him. This was easily explained, if G.-L. Kemp's evidence be taken as true. The missing receipt, though sought for, could not be found. He submitted, however, that, even though the court should be of opinion to exclude parol evidence in proof of payment of a debt due under a judgment, yet, the receipt and letter signed by Fisher & Smith formed a sufficient *commencement de preuve par écrit* to entitle the defendant to the benefit of Kemp's evidence,

and the case would then be found to be fully made out. The following authorities were cited in support of the argument : *McGahey* vs *Alston et al.*, 2 Meeson & Welby's Rep., p. 206 ; 2 Pothier, édition Bugnet, Oblig., n° 781, p. 426, 9 Toullier, n° 215, p. 343 ; 10 Dalloz, *Jurisprudence Générale du Royaume*, édition de 1830, pp. 726 et 727 ; le même, v° Oblig., note 2.

LUNN, *contra*, said that, by the operation of the transfer from Miller to Thayer, the debt had been divided, and that no receipts signed by Miller or his attorneys could form any *commencement de preuve par écrit* as against Thayer ; that the statement and receipts produced, and the evidence of Judge Smith shewed plainly that Fisher and Smith were acting in the matter as Miller's attorneys only, and had nothing to do with the amount transferred to Thayer. That the question of the admissibility of verbal evidence, in a case of this kind, must be decided according to French law, and that, by that law, such evidence was excluded. Pardessus, *Droit Commercial*, vol. 1, p. 529, n° 263 ; Nouguier, *Tribunaux de Commerce*, vol. 3, p. 65, § 47 ; Toullier, *Preuve Testimoniale*, vol. 9, n° 235, p. 371 ; that there was no proof that the pretended missing receipts had been lost or destroyed by a *cas fortuit ;* that the finding of the other two receipts afforded a strong presumption that the third would have been found too, if it had ever existed.

MONDELET, J., in rendering judgment, said there could be no doubt that the rule of law was that verbal evidence could not be adduced, to prove payment of a debt due under a judgment ; that the receipts produced did not form a *commencement de preuve par écrit* against Thayer, inasmuch as Fisher and Smith were not acting as his attorneys. The evidence of G.-L. Kemp was, therefore, properly rejected, and there being no evidence to support the allegation of payment, the judgment, dismissing defendant's contestation, must be confirmed. Judgment accordingly. (14 *J.*, p. 74)

A. and W. ROBERTSON, for defendant.

CROSS and LUNN, for *reprenants l'instance.*

MARINE AND FIRE INSURANCE.

SUPERIOR COURT, Montreal, 30th December, 1869.

Coram MACKAY, J.

MOORE *vs* THE HOME INSURANCE COMPANY.

Held : 1. That deposit by the insured of bills of sale and documents requisite for showing ownership of a vessel, with the collector of cus-

toms for registration, is sufficient to give an insurable interest, though actual registration be not made till after the destruction of the vessel by fire.

2. That if this be not so, the insured may fall back upon any *anterior* title registered, from which he can deduce insurable interest.

3. One of two trustees, part owners, can insure a vessel.

MACKAY, J.: On the 14th of April, 1867, Owen Lynch procured to be insured the steamer *Empress*, tackle and furniture, valued at $14,000, to the extent of $5,500, for one year, by a marine policy, against the usual dangers of navigation, and also against fire. The premium was a note for $385, given to defendants. Beyond $10,500, Lynch was not to make insurance on the vessel. On the 18th of March, 1868, at Kingston, the boat was destroyed by fire, with all its tackle and furniture. The plaintiff's declaration alleges these things, and that the values lost were $14,000, and that all the property lost was owned by Lynch; that the only other insurance was with the British America Insurance Company, of $5,000, of which defendants had notice; that $1,145 was realized by the sale of the wreck; that all notices were given; and that, afterwards, Lynch assigned his rights of action to plaintiff, of which defendants had notice. Conclusions for $5,500. The defendants have pleaded that, at the time of the fire, Lynch had no interest in the steamer and had ceased to be owner, and, afterwards, could transfer no rights to plaintiff. By a second plea, it is said that the representation made by Lynch at the time of insuring, that the subjects insured were worth $14,000 was false and fraudulent, the vessel being then only worth $8,000; that defendants entered into said contract by reason of said representations, and believing Lynch to be his own insurer to the extent of $3,500, which would render him careful in the management of the boat, &c. That the policy of insurance ought to be annulled, and the transfer to plaintiff declared void. By another plea, the fire is alleged to have been caused by the culpable acts and gross negligence of owner Lynch, or his servants, and the policy, it is said, so became avoided. The fourth plea is as to a magistrate's certificate not having been produced. This issue is subsequently abandoned. The fifth plea says that any fraud or overcharge in the claim was and is to vitiate the policy; that the claim made by Lynch is fraudulent and exaggerated to the extent of $5,000, and the swearing thereto was false. Conclusions accordingly. The defendants got leave to amend their first plea, by alleging that, when the assurance was effected and during the risk, Lynch was not the owner of the *Empress*, and was not registered as such according to the statute, in that case made and provided, and had no insurable interest therein; that, at the time of the insurance, the steamer was

owned by the Beauharnois, Chateauguay and Huntingdon Navigation Company, and Lynch, so, had no right to transfer to plaintiff. On the 14th of April, 1869, the second and fifth pleas were formally abandoned by defendants. The case went to a jury in November last. Upon the questions submitted to them, the jury found (chiefly upon admissions signed by both parties) that defendants had insured Lynch as alleged; that the boat was burned as alleged; that it was worth $14,000; that Lynch had an interest in the boat to the full extent of her value at the time of the fire; that he suffered the loss and damage mentioned in his declaration; that the fire was not caused by any gross negligence. In answer to the 4th and 5th questions: "Was said Owen Lynch, at the time of the fire or at the time of the insurance, or during the risk, the owner of the steamer?" "Was he, during the risk or at any time, registered as such owner, according to the requirements of the statute in that case made and provided?" The jury found as follows: "We find that, on the 10th day of April, 1865, Charles-F. Gildersleeve was the registered owner of the whole sixty-four shares of the steamer *Empress*. On that day, Gildersleeve executed the bill of sale fyled, Owen Lynch and Charles-B. Dewitt therein named acting as trustees for the Beauharnois, Chateauguay and Huntingdon Navigation Company, and the said instrument was duly registered on the 11th day of April, 1865. On the same day, Owen Lynch and Charles-B. Dewitt executed the instrument purporting to be a bill of sale by way of mortgage, which was also registered on the 11th day of April, 1865. On the 3rd day of December, 1867, Gildersleeve executed the instrument purporting to be a release and discharge of the last above-mentioned bill of sale by way of mortgage. On the 19th of April, 1866, Owen Lynch and Charles-B. Dewitt executed the instrument purporting to be a bill of sale of the steamer *Empress*, to the Beauharnois, Chateauguay and Huntingdon Navigation Company. That, on the 20th day of March, 1867, the steamer *Empress* was adjudged to Owen Lynch, as the highest bidder, at a sale of the steamer, at public auction, made by John-J. Arnton, auctioneer, and that, from that date up to the burning of the steamer, she was in the possession of Owen Lynch. On the 3rd day of July, 1867, the Beauharnois, Chateauguay and Huntingdon Navigation Company executed the instrument purporting to be a bill of sale of the said steamer to Owen Lynch. The third above-mentioned instrument was deposited with the collector of customs, at Kingston, for registration, on the 3rd day of December, 1867. The two last-mentioned instruments were deposited with the said collector of customs, for registration, between the 8th and 19th days

of July, 1867, and remained so deposited until the 5th day of December, 1868. The three last-mentioned instruments were not registered by the collector till the 5th day of December, 1868, as appears by the copies of registry and of the certificate of ownership, on the 13th day of April last; the reason given by the collector for not registering them before, being that the certificate of ownership was not produced." What is the effect of the verdict? The finding as to Lynch's interest in the boat to the full extent of her value, at the time of the fire, was made subject to the opinion of the Court, upon the legal effect of the findings upon the 4th and 5th questions. Each party claims to be entitled to judgment in his favour upon the verdict. Nothing is moved by defendants but that plaintiff's action be dismissed upon the verdict and findings of the jury. The plaintiff moves, upon the same verdict, that defendant be condemned as prayed. We have before us the certificate of ownership of the steamer, from which it appears that Charles-F. Gildersleeve was registered owner of it up to the 10th of April, 1865, when he sold it to Owen Lynch and C.-B. Dewitt, who are *not* styled trustees. On the same 10th of April, they sold it, by way of mortgage, to C.-F. Gildersleeve, for securing $10,000 to him. Those deeds were duly registered at the Custom House, at Kingston. On the 3rd of December, 1867, Gildersleeve released that mortgage. On the 19th of April, 1866, Lynch and Dewitt sold the *Empress* to the Beauharnois, Chateauguay Huntingdon Navigation Company. On the 3rd of July, 1867, that company sold her to Owen Lynch individually. The release of Gildersleeve's mortgage, the sale to the Beauharnois, Chateauguay and Huntingdon Navigation Company and the sale to Owen Lynch were actually registered on the 5th of December, 1868, that is after the fire. They had been deposited for registration in July, 1867. We have on our statute book an Act, ch. 41, C. S. C., for the registration of inland vessels. Upon this, defendants build up their only real defence. It orders the collector of customs to make registration of all vessels, &c., and whenever the property in any vessel is sold, the sale must contain a recital of the certificate of ownership, or the principal contents thereof, otherwise, such transfer shall not be valid for any purpose, either in law or equity. By section 16, it orders that no bill of sale shall pass the property in any vessel, after a certificate of ownership has been granted, or have any other effect, until it has been produced to the collector, nor until such collector has entered in the book of registry the name, &, of the vendor, the number of shares transferred, &c. Lynch, before the time of the fire, had deposited at the Custom House all the bills of sales

and documents requisite for showing ownership of the *Empress*, but the collector had not actually entered them on the book. The certificate of ownership not having been produced to the officer, he thought that he was not bound to register. But it was not required to be produced and, without its being produced, the collector, later, but after the fire, did register all the papers. As to the discharge from Gildersleeve, I do not believe it required registration (C. S. C., cap. 41, sec. 23). The collector had never been asked by Lynch to certify anything, by endorsement, on the certificate of ownership, nor needed Lynch offer to him the certificate of ownership. The collector ought promptly to have registered the bills of sale presented to him for registration. Lynch's case, or plaintiff's, as transferee of him, differs very much from those cited by defendant from Espinasse, Durnford and East, Taunton and Vesey, where plaintiffs were held to have no insurable interest, by reason of not having complied with the requirements of the Merchants' Shipping Acts. In all those cases, the plaintiffs had neglected to do acts required to be done by them. Here, plaintiff, or rather Lynch, having done all that he had to do, but act to be done by the public officer being undone, defendants claim to go free and that Lynch had no insurable interest. "The Ship Registry Acts, so far as they apply to defeat titles, are to be held strictly as penal, and not literally as remedial laws," says Dwarris. All the English Acts, before Victoria, were peremptory, yet, were not interpreted literally always; for instance, though a bill of sale, on a mortgage of a ship, was " utterly null to all intents and purposes," a mortgagor could be sued upon covenant in the mortgage unregistered, for the repayment of the money lent; for, said the judges, " to go so far as to vacate the covenant for the payment of the money lent, would be beyond the reason and object of the Legislature, and working injustice." Lord Tenterden said: "The instances in which fair and honest transactions are rendered unavailable, through a negligent want of compliance with the forms directed by clauses of the statutes requiring a public registry of conveyance, make the expediency of all such regulations, considered as to private benefit only, a matter of question and controversy." Therefore, it was in England that they struck off their statute book these said clauses. Unfortunately, we have them still existing. *Ad impossibile nemo tenetur.* " Suppose a collector to receive my deed for registration, but to refuse to register, am I to have no property in my ship, or no insurable interest in such case, says plaintiff, until after a tedious law suit or a *mandamus* followed by actual registration." There is much to be said for plaintiff, the maxim may help him with this other one: " *Censeri facta impossibilia*

quæ commodè fieri non possunt. Suppose the Registry Act had said that any vessel should be forfeited if the deed of sale, transferring it, was not produced to the collector and registered by him in the book of registry within ten days after the execution of it, &c., a vessel is sold, the deed taken, on the day of sale, to the collector, for registration, but not registered by him in fifteen days, could a forfeiture be obtained from the mere fact, though the public officer alone was in fault? Sir Wm. Scott says: "The law must bend to necessity sometimes." "The law, in its most peremptory injunctions, is understood to disclaim all intention of compelling people to do impossibilities, and the administration of laws must adopt that general exception, in the consideration of all particular cases." Might we not hold that, under the special circumstances of this case, Lynch had done all necessary, and had, at the time of the fire, insurable interest, proceeding from the several deeds mentioned, the last one to himself from the Navigation Company? But, admitting the contrary (as contended for by the Insurance Company), may not Lynch fall back upon the last deed registered before the fire, the one to Lynch and Dewitt? This deed reads to make them part owners, two owners of the vessel. Lynch does not, in his declaration, set up any particular title deed of ownership; he simply says he was owner, so he is not like a plaintiff who has to recover upon the particular title deed set up, or not at all. But, say defendants, Lynch was only a trustee. It appears from the verdict that so he was. What kind of a trustee is not found. What powers had he and Dewitt? Was one under disability to act alone? We are not informed. No condition of his policy obliged Lynch to declare particularly his interest as that of a trustee or mortgagor. On 3rd December, 1867, Gildersleeve discharged Lynch and Dewitt from all indebtedness to him. This discharge did not require registration, and Lynch and Dewitt did not, by mortgaging, cease to be owners of the *Empress*. If the deeds, not registered until December 5th, 1868, are to go for "null and void, for any purpose, either in law or equity," I still see a title registered and proofs made, which establish Lynch and Dewitt owners (trustees it is true) of the *Empress*, discharged from all encumbrances on and from 3rd December, 1867, long before the fire. Our Registration of Vessels' Act, before mentioned, orders that the property in every vessel belonging to more than one owner shall be considered to be divided into sixty-four equal shares, and the proportion held by each owner shall be described in the certificate of ownership as being a certain number of sixty-fourth shares; and no person shall be entitled to be registered as an owner in respect of any shares which

shall not be an integral sixty-fourth share, &c. At the argument before me, this clause was referred to as shewing another weakness in Lynch's title, fatal to plaintiff's case. In fact, Lynch and Dewitt are not registered each for 32-64ths. Before registration there would have been more force in defendants' objection. But they *have been* registered as owners. The law says the vessel is considered divided into sixty-four equal shares. In face of all this and of the registration, I think defendants' objection, founded on Lynch's not having been registered literally for thirty-two sixty-fourth shares, weak. The law does not enact, in this clause, any *peine de nullité*. By division, the property or number of shares of Lynch could be ascertained without difficulty. By division, between two, of a thing that is to be considered divided into sixty-four equal shares, does not each get thirty-two sixty-fourths? Is not this, too, an integral sixty-fourth share? Registrations are often made of three-fourths of a ship, one-fourth of a ship, and other shares, as, for instance, fifteen-sixteenths, *not* any specified number of sixty-fourth shares. I notice that, by no plea, is this objection of defendants specially made, that Lynch did not stand registered for a stated number of sixty-fourth shares. "Lynch had no insurable interest," say defendants; "true, there is a deed to him, and he has had possession; nobody else has claimed title adversely to him, but he had no insurable interest." What is insurable interest? It would be extremely difficult to give any accurate definition. The interests of commerce and various and complicated rights, which different persons may have in the same thing, require that not only those who have an absolute property in ships, but those also who have a qualified property therein, may be at liberty to insure them. Possession of a ship, with an authority to manage it, confers an interest entitling to insure. (Marshall) "Can a trustee insure? There is no doubt that he may," says Lord Kenyon. Had Lynch insurable interest? I have no doubt he had. If he had not under the unregistered deeds, he had under the deed to him and Dewitt. Could the Navigation Company have taken the boat from them without their consent or judgment of law? Who else was to insure? Had the Navigation Company done so, defendants might, after a loss, have opposed to them non-proprietorship for want of registration. Lynch, at the date of the policy and at the time of the fire, had an interest in the conservation of this steamer *Empress*; he was exposed to lose it, if it was destroyed. He had an insurable interest. *Non constat* that he had not claims even against the Navigation Company. The jury find him to have been interested. As to the amount found, supposing that he had an insurable interest,

I am not to say whether it be fair or excessive, for no motion for new trial is made. I will presume some interest in Lynch. When two buy a ship we call them part owners. We say that one can't sell more than his share. In such a case, what do we mean by "his share?" In the absence of other information, we mean his half or thirty-two sixty-fourths. Under the sale here to Lynch and Dewitt, registered as it was, any body would have taken deed, from either, for thirty-two-sixty-fourths, and could have gotten registration upon it accordingly. It is opposed to plaintiff that Lynch was only one of two owners, and that they were acting as trustees for the Navigation Company. But he proves a loss that this money from defendants will not suffice to pay the half of. He has not by the verdict been awarded beyond the extent of his interest. The jury find him to have been interested. They fix his loss at all he stated. This part of the verdict is submitted to; subject only to the Court's rulings upon other points. These rulings are against defendants. Seeing the proofs made by Lynch, defendants ought to have made it clear upon this record that he had no insurable interest. Has a trustee, or one of two trustees, never an insurable interest? The verdict ought to be interpreted in favor of plaintiff. The equities are all on his side. What did it signify to this Insurance Company whether the collector of customs, after the deposit of the deeds with him for registry, took a month, or three months, to make the actual registration of them? Had express condition, upon the policy, ordered such actual registration (as condition precedent to effective insurance) I *might* recognize some force in the argument that actual registration was required, and that, never mind what was the cause of its not having been performed, the insurers were to go free if it was not performed. But the present is a different case. Upon the whole, I feel that plaintiff, representing Lynch, is entitled to the benefit of a judgment in his favor. The defendants' motion is rejected, and judgment for plaintiff upon his motion. (14 *J.*, p. 77)

J. J. DAY, Q. C., and R. LAFLAMME, Q. C., for plaintiff.

H. STUART, Q. C., and HON. J. J. C. ABBOTT, Q. C., for defendants.

CESSION DE BIENS.

COUR SUPÉRIEURE, Montréal, 21 avril 1869.

Coram MONDELET, J.

WHYTE, ès-qualité, *vs* COHEN, *et* ledit COHEN, requérant.

Jugé: Qu'un créancier qui a consenti à ce que son débiteur fasse une cession, autrement que de la manière prescrite par l'acte de Faillite, 1864, 27-28 Vict., ch. 17, ne peut se prévaloir de cette cession pour assujettir les biens de ce débiteur à la liquidation forcée.

En octobre 1868. le défendeur fit une cession générale de ses biens à J.-M. Dufresne. Cette cession n'avait pas été précédée des avis requis par l'acte de faillite. Mais tous les créanciers, en apparence, y ont donné leur assentiment, et, particulièrement, J.-C. Frank qui a signé le procès-verbal d'une assemblée des créanciers, qui a donné des instructions au syndic Dufresne, sur le mode de disposer des biens de la faillite. En outre, ces mêmes créanciers, y compris Frank, accordèrent, le 17 novembre 1868, un acte de décharge au défendeur, en considération de la cession qu'il avait faite à Dufresne. En janvier 1869, Frank devint insolvable et fit une cession, en vertu de l'acte de faillite, à John Whyte, le demandeur. En cette qualité, Whyte fit émaner contre le défendeur un bref de saisie-arrêt en liquidation forcée, alléguant, dans son affidavit, la cession de Cohen à Dufresne, et s'appuyant sur la sect. 3, § *i.* de l'acte de Faillite de 1864, 27-28 Vict., ch. 17, qui donne droit à un créancier de mettre en liquidation forcée les biens de son débiteur, si ce dernier " a fait un " transport ou une cession générale de ses biens au profit de " ses créanciers, autrement que de la manière prescrite par le " présent acte." Le défendeur présenta une requête alléguant tous les faits ci-dessus et concluant à la cassation et annulation du bref de saisie, vu que Frank avait ratifié son acte de cession et lui avait, en conséquence, accordé une décharge. A l'audition, le requérant cita à l'appui de sa prétention Edwin James, *Bankrupt Law, U. S.*, p. 249, sect. 39. A la page 176, le même auteur s'exprime en ces termes : " Such an assign- " ment will only constitute an act of bankruptcy when all " the creditors do not all assent to the deed ; as no creditor " who is either a party or privy to the assignment, or has " even acted under it, can afterwards set it up as an act of bankruptcy." Neville and Manning's Rep., vol. 1, p 279. La jurisprudence en Angleterre, sous le Statut d'Elizabeth, qui avait, sur cette matière, une disposition analogue au nôtre, était uniforme dans ce sens : " Such a conveyance is good as " against the party executing it, and also against any other

" person privy and consenting to it." Taunton's Rep., vol. 1, p. 381 ; Barnewall and Alderson's Rep., vol. 2, p. 134.

PER CURIAM : Franck, que le demandeur représente en qualité de syndic, a ratifié l'acte de cession sur lequel le demandeur se base pour demander la liquidation forcée des biens du défendeur : cette ratification enlève au demandeur le droit de s'en plaindre. Bien plus, en considération de cette cession, Franck a accordé un acte de décharge au défendeur ; il n'était donc plus son créancier. Le demandeur ne peut pas avoir plus de droits que son auteur. Le bref de saisie a donc été illégalement émis ; en conséquence, il est cassé, et le demandeur est débouté de sa demande. (14 *J.*, p. 83)

F. E. GILMAN, pour le demandeur.

CHAPLEAU and RAINVILLE, pour le défendeur et requérant,

PROCEDURE.—REVIEW.

SUPERIOR COURT, Montreal, 18th September, 1869.

Coram MACKAY, J.

MEIGS *et al. vs* AIKIN *alias* CURTIS.

Jugé : That while the record in a cause is before the Court of Review, for the purpose of obtaining the revision of a judgment of the Superior Court, no proceeding in the cause can be taken in the Superior Court.

KERR, for defendant, moved to quash the *capias* under which defendant had been arrested.

DEVLIN, for plaintiffs, said there was a preliminary objection to this motion. The record was not before the court, the cause being then pending before the Court of Review, on appeal from a judgment of the Superior Court quashing the *capias* on petition. He referred to *Beauvais* vs *DeMontigny* (1), in which TORRANCE, J., refused an application to examine a witness about to leave the province, on the ground that the record was before the Court of Review.

MACKAY, J., stated, on the following day, that he had taken time to confer with his brother judges, and they were all of opinion that the application could not be granted. Motion rejected. (14 *J.*, p. 84)

B. DEVLIN, for the plaintiffs

W. H. KERR, for the defendant.

(1) La requête, demandant l'interrogatoire immédiat d'un témoin sur le point de quitter la province, ne peut être accordée par la Cour Supérieure pendant que le dossier est devant la Cour de Revision sur inscription en revision d'un jugement interlocutoire rendu dans la cause. (*Saint-Gemmes dit Beauvais* vs *de Montigny*, C. S., Montréal, 22 octobre 1868, TORRANCE, J., 12 J., p. 343, et 17 R. J. R. Q., p. 452)

INTERETS.—PRESCRIPTION.—ENREGISTREMENT.

COUR DU BANC DE LA REINE, EN APPEL,
Montréal, 9 décembre 1869.

Coram CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

EDWARD MACDONALD *et al.*, appelants, *et* THÉOPHILE NOLIN, intimé.

Jugé : 1. Que le tiers détenteur poursuivi hypothécairement est tenu au paiement de tous les arrérages d'intérêt non prescrits, au-delà de deux ans et l'année courante, quoiqu'aucun enregistrement spécial n'en ait été fait.

2. Que la formalité de l'enregistrement d'un bordereau d'arrérages d'intérêt non prescrits, au-delà de deux années et l'année courante, n'a l'effet de changer la loi commune que pour un cas particulier, savoir pour le cas où deux créanciers hypothécaires se présentent par concurrence à la distribution du produit d'un immeuble vendu en justice.

Une action hypothécaire a été intentée le 2 juillet 1868, dans le district d'Iberville, par les appelants contre l'intimé, pour $553. Dans leur action, les appelants allèguent que, le 20 février 1868, ils ont fait inscrire, suivant la loi, au bureau des hypothèques, à Saint-Jean, un sommaire des intérêts dus en vertu de leurs obligations à venir au 4 janvier 1868. Par ce sommaire, les appelants ont enregistré 4 ans 9 mois 4 jours d'intérêt sur la première obligation ; 3 ans et 24 jours sur la 2me, et 2 ans 9 mois et 14 jours sur la 3e. L'intimé, par exception, a allégué que, dès mars 1867, Louis Molleur, son auteur, était propriétaire et possesseur de la terre qui avait été hypothéquée par Eloge Tremblay, et en vertu de titres enregistrés en mars 1867 ; que cette terre se trouvait, le 7 avril 1868, hypothéquée pour une égale et même somme, en vertu desdits trois actes d'obligations, savoir pour une somme de $553 de capital, et, en sus, pour $144 d'intérêt, pour deux années entières, et ce qui était dû sur l'année alors courante, formant $697, et qu'à cette date-là l'intimé et Boissonneau auraient offert cette somme de $697 aux appelants, à condition qu'ils donnassent mainlevée des hypothèques, ce qui fut refusé par les appelants. Puis l'intimé a réitéré ses offres devant la cour, concluant à ce que jugement intervint contre lui pour cette somme seulement et que les appelants fussent condamnés aux dépens.

La Cour Supérieure d'Iberville a, le 20 novembre 1868, maintenu les offres du défendeur. Voici les remarques du juge qui a rendu ce jugement et aussi le jugement de la Cour Supérieure.

SICOTTE, J. : La partie demanderesse conclut à ce qu'il soit adjugé que le créancier, par la seule inscription primitive de sa créance, a hypothèque, à l'encontre de l'acquéreur qui prend inscription de son titre, avant l'enregistrement d'aucune inscription nouvelle, pour les intérêts, après les deux années, pour tous les intérêts accrus depuis le titre, et, sans que le créancier soit tenu à prendre inscription nouvelle pour tel surplus d'intérêts. Les demandeurs affirment, comme doctrine, que les clauses 37 et 38 du ch. 37 des S. R. B. C. de 1861 n'affectent que le cas particulier où deux créanciers hypothécaires se présentent, par concurrence, à la distribution du produit d'un immeuble qui leur est hypothéqué. On ne peut nier que, si cette doctrine est exacte, il importe qu'elle soit bien comprise et généralement connue. Mais, de l'autre côté, il importe également que cette doctrine soit examinée au point de vue de la législation et des principes. Notre législation sur l'enregistrement et la publicité des hypothèques fut une sage innovation et une grave dérogation au droit commun. Mais cette innovation et la publicité des hypothèques sont devenues notre droit commun. Quel est ce droit ? On en trouve les principes et les applications largement et clairement énoncés dans le code qui a parfaitement résumé toute la législation. Art. 1982 : " Les causes légitimes de préférence sont les privilèges et les hypothèques." Art. 2016 : " L'hypothèque est un droit réel sur les immeubles affectés à l'acquittement d'une obligation, en vertu duquel le créancier peut les faire vendre en quelques mains qu'ils soient, et être préférés sur le produit de la vente suivant l'ordre du temps, tel que fixé dans le code." Art. 2017 : " L'hypothèque assure outre le principal les intérêts qu'il produit, sous les restrictions portées au titre : *De l'Enregistrement des Droits Réels*, et tous les frais encourus." Art. 2018 : " L'hypothèque n'a lieu que dans les cas et suivant les formes autorisées par la loi." Les créanciers exercent leur droit de suite par l'action hypothécaire. Arts 2056 et 2057. Art. 2082 : " L'enregistrement des droits réels leur donne effet et établit leur rang." Art. 2085 : "L'avis donné ou la connaissance acquise d'un droit *non enregistré* appartenant à un tiers et soumis à la formalité de l'enregistrement, *ne peut préjudicier aux droits de celui qui a acquis depuis pour valeur, en vertu d'un titre dûment enregistré*, sauf les cas où l'acte procède d'un failli." Les droits réels ont rang suivant la date de leur enregistrement, art. 2130. Le code est encore moins emphatique dans son langage que l'ordonnance promulguant l'innovation de la publicité des hypothèques. L'Ordonnance disait : " Tout acte, droit, toute réclamation privilégiée et hypothécaire, s'il n'en a pas été fait d'enregistrement, sont sans valeur et de nul effet, à l'encontre des tiers, des créanciers ou des acquéreurs sub-

séquents, qui ont pris inscription et enregistrement." Après avoir statué la nécessité absolue de l'enregistrement pour conserver l'hypothèque, l'Ordonnance a réglé la même matière relativement aux intérêts qui pouvaient se rattacher à l'hypothèque comme accessoires. La clause 37 du chap. 37 des S. R. B. C. de 1861 est dans les termes suivants sous le titre général "Claims for interest": "No creditor shall be entitled, "by reason of the registration of a hypothec or privilege, to "a preference before others, for more than two years arrears "of interest and the interest for the current year, reckoning "from the date of the document under which the same may "arise, unless his claim for arrears of interest to a specific "amount, beyond the arrears of two years, has been separ-"ately registered as being due under such hypothec or pri-"vilege." Cette clause est aussi générale que possible; elle s'applique à tout créancier réclamant des intérêts à l'encontre d'autres. Pour ne laisser aucun doute sur l'universalité de la clause à toutes les circonstances, où des intérêts sont réclamés à l'encontre de tiers, la loi s'est expliquée dans la clause même. Le législateur continuant à régler l'enregistrement, quant aux rentes constituées, aux prix de vente, accorde, dans ces cas, hypothèque pour cinq ans, et statue ensuite en ces termes (sec. 37, § 2): "Et dans tous ces cas, l'enregistrement du titre du créancier aura l'effet de conserver son hypothèque ou privilége pour les intérêts et arrérages de cinq années, et pour ceux de l'année alors courante à compter de la date dudit titre, mais pas plus." Il est bien dit, bien ordonné que l'hypothèque est perdue, quant aux intérêts au-delà des deux ou cinq années, s'il n'a pas été fait d'enregistrement. La clause 38, par surbondance d'explication et d'interprétation donnée par le législateur même, s'exprime d'une manière générale, pour bien faire comprendre que l'hypothèque des intérêts, au-delà des périodes indiquées, n'existe pas, si on ne prend pas nouvelle inscription, et que les intérêts sont considérés et traités, à l'égard des tiers, comme une nouvelle créance subordonnée, pour les mêmes raisons, à la publicité par l'enregistrement. "The hypothec preserved by the registration of any claim to interest or arrears not preserved by the original registration, shall date only from the registration of such claim" (sec. 38). Le législateur a abondé d'interprétation sur la matière. On en trouve une autre dans le Statut de 1843. La 10e clause du chap. 22 de ce Statut de 1843, 7 Vict., décrète: "La 16e clause de ladite Ordonnance (4 V., chap. 30) sera censée réserver au créancier, le droit de réclamer non-seulement les intérêts et arrérages de deux années, mais encore les intérêts et arrérages de l'année courante, à compter de la date du titre en vertu duquel ils seront dus, et que l'hypothèque *créée* par l'enregistre-

ment de toute créance pour intérêts ou arrérages qui n'auront pas été conservés par l'enregistrement primitif, ne datera que du jour de *l'enregistrement de telle créance.*" Le droit du créancier, comme droit hypothécaire, est limité à réclamer deux ou cinq années d'intérêts, suivant la nature de la créance. L'hypothèque pour le surplus des intérêts est créée par le nouvel enregistrement qui est prescrit; et, comme tout autre droit réel, n'existe à l'encontre des créanciers ou des acquéreurs subséquents que de la date de l'enregistrement. Le tiers détenteur a les mêmes droits que tout autre créancier pour opposer le défaut d'enregistrement, c'est surtout quant à lui que le défaut d'inscription, quand elle est requise par la loi, est fatal et absolu. Car, on ne peut oublier que c'est principalement dans l'intérêt du mouvement de la propriété, que représente l'acheteur, que la publicité de l'hypothèque a été ordonnée. D'après le droit commun, le privilége et l'hypothèque n'existent, à l'encontre des créanciers ou des acquéreurs subséquents, que par l'inscription. Cette règle s'applique aux intérêts après les deux ou les cinq premières années, comme au capital. Il est impossible, sans faire erreur, de donner une autre interprétation, et, dans tous les cas, le législateur ayant ainsi interprété sa loi, les tribunaux ne peuvent mettre leur interprétation à la place de celle du législateur. Les codificateurs ont également déclaré que telle était la loi avant la codification; et le code en fait des textes qui sont aussi clairs que précis, dans le même sens. Art. 2122 : " L'enregistrement d'un acte de vente conserve au vendeur, au même rang que le principal, les intérêts pour cinq années généralement et ce qui est dû sur l'année courante." Art. 2124 : " L'enregistrement de tout autre titre de créance ne conserve le même droit de préférence que pour deux années d'intérêt généralement et ceux échus sur l'année courante." Art. 2125 : " Le créancier *n'a d'hypothèque* pour le surplus des arrérages d'intérêts ou de rente qu'à compter de l'enregistrement d'une demande ou bordereau spécifiant le montant des arrérages échus et réclamés." Voilà qui est bien clair. Le créancier n'a pas d'hypothèque pour les intérêts accrus après les deux ou cinq premières années, s'il ne prend pas inscription pour le surplus de ces intérêts. Le droit de suite ne découle pas de l'hypothèque, mais de l'enregistrement. C'est la conséquence du système de la publicité, et elle est écrite dans l'article 2056. " Les créanciers ayant privilége ou hypothèque *enregistrée* sur un immeuble, le suivent en quelques mains qu'il passe." Ce droit de suite s'exerce par l'action hypothécaire. Le droit de suite est limité à l'hypothèque enregistrée, dans tous les cas où la loi requiert la formalité de l'inscription pour accorder et faire apparaître l'hypothèque. L'action hyppthécaire est donc limi-

tée à la seule partie de la créance devenue hypothèque par l'enregistrement. Pas d'hypothèque, pas d'action hypothécaire. Or la loi déclare que les intérêts ne conservent leur caractère hypothécaire, ne constituent hypothèque, au-delà d'un certain nombre d'années, que sous la condition d'enregistrement spécial ; il faut bien dire qu'il n'y a pas d'hypothèque sans cette formalité. C'est la loi commune tant pour le principal que pour les intérêts. L'article 2061 définit l'action hypothécaire : " L'objet de l'action hypothécaire est de faire condamner le détenteur à délaisser l'immeuble pour qu'il soit vendu en justice, si mieux il n'aime payer la créance en principal, les intérêts *conservés par l'enregistrement*, et les dépens." Ainsi, s'il paie le principal et les intérêts conservés par l'enregistrement, il obtient mainlevée de l'action ; car le droit de suite cesse par le paiement qui éteint l'hypothèque même, qui seule lui donnait force et valeur. L'article 2125, qui résume parfaitement la lettre et le sens de la loi, n'accorde d'hypothèque que pour ce que le détenteur avait offert et consigné. L'article 2061 porte que s'il paie le capital et les intérêts conservés par l'enregistrement, c'est tout ce que le créancier peut obtenir par son action hypothécaire. Il est donc de toute évidence que le tiers détenteur ne doit que les intérêts inscrits et conservés par cette inscription. En payant ce qui est inscrit, il paie effectivement, comme s'il consignait dans le cas de confirmation de titre. Le créancier reçoit tout ce qu'il pouvait réclamer s'il venait à l'ordre, et sans contestation de la part d'autres créanciers. Le système entier de notre régime hypothécaire serait attaqué, si la doctrine contraire était exacte. La publicité qui est la base du système serait illusoire, si une inscription pouvait conserver une masse d'intérêts qui pourrait dépasser le capital, sans qu'il fut besoin de faire connaître ce fait aux acheteurs. La loi, décrétant l'enregistrement d'une demande d'intérêts après une certaine période, serait lettre-morte et sans utilité, si la première inscription du titre conservait cette masse d'intérêts contre les acquéreurs. La publicité de l'hypothèque n'est pas pour le prêteur seulement. Le mot créancier, dans tout l'ordre hypothécaire, désigne toute personne ayant un droit, un intérêt contraire. La transmission de la publicité est la base du crédit foncier, et si l'acquéreur ne peut acheter avec sûreté, à la face des hypothèques inscrites, l'hypothèque du prêteur deviendra bientôt illusoire, par le discrédit de la propriété même. En offrant et payant la créance hypothécaire, le détenteur a droit de demander d'être subrogé aux droits du créancier contre tous ceux qui peuvent devoir la dette personnellement ou hypothécairement, et il doit être reçu dans ses offres, même si le paiement ne paie pas tout ce que le débiteur peut devoir ; mais, pourvu qu'il éteigne la créance, telle qu'elle est d'après les inscriptions requises par la loi. Car la loi est pré-

cise, faute de l'enregistrement requis, dans les cas indiqués et de la manière prescrite, l'hypothèque est sans valeur et de nul effet à l'encontre de créanciers et d'acquéreurs subséquents qui ont pris inscription. " En effet, dit Troplong, la loi ayant exigé que l'hypothèque soit inscrite, toute hypothèque non inscrite est réduite *ad non esse*, à l'encontre des tiers." Pour démontrer ce qu'il y a d'illogique et de contradictoire dans la doctrine de la demande, il suffit d'en suivre l'exécution. Le tiers détenteur délaisse ; l'immeuble est vendu. D'après cette doctrine, le créancier poursuivant, venant à l'ordre, ne sera colloqué que pour deux années d'intérêts. Cependant l'arrêt qui serait rendu déclarerait l'immeuble grevé non seulement pour ces deux années, mais pour toutes les années depuis la date du titre. Pourquoi le créancier ne sera-t-il pas colloqué pour le montant que cet arrêt aurait déclaré grever l'immeuble ; c'est parce que, faute d'inscription pour le surplus des intérêts, il n'a pas d'hypothèque pour tel surplus ; et qu'à l'encontre des tiers sa dette pour ces intérêts non inscrits, n'est que dette chirographaire. Si le créancier n'a pas inscrit, n'a pas enregistré, il n'a pas droit de suite contre l'immeuble sur lequel il a pris hypothèque, quand son débiteur a vendu cet immeuble, et que l'acquéreur a pris inscription et enregistrement de son titre d'acquisition. La loi déclare la même déchéance dans le cas d'intérêts au-delà des deux ou des cinq années, et pour lesquels on n'a pas pris l'inscription requise. La loi ne fait pas de différence, ni d'exception. Le droit de suite, il a déjà été remarqué, ne s'attache pas à l'hypothèque proprement dite, il découle essentiellement et uniquement de l'enregistrement. C'est le droit commun, dans tous les cas. Le présent jugement est fondé non pas sur les clauses 37 et 38, mais il repose sur le régime hypothécaire, dont le principe est consacré dans son universalité et dans sa plus large expression dans la première clause de l'Ordonnance ; les motifs découlent de ce principe souverain, bien défini, parfaitement formulé, que toute préférence est refusée à l'encontre de tiers inscrits, soit créanciers, soit acquéreurs, pour tout droit hypothécaire soumis à la nécessité et aux formalités de l'enregistrement, quand cet enregistrement n'a pas été fait, de cette règle, exprimée dans les textes et dans l'esprit de la loi ; que la transcription du contrat translatif de la propriété d'un immeuble entraîne la déchéance de toute hypothèque subordonnée à la formalité d'une inscription qui n'a pas été prise, et, par conséquent, la déchéance du droit de suite.

Jugement : " La Cour, attendu, en fait, que la demande est une action hypothécaire, dirigée contre le défendeur, pour le faire condamner à délaisser en justice l'immeuble décrit dans les écritures des demandeurs, pour qu'il soit vendu en justice,

faute de paiement des créances hypothécaires réclamées. Attendu, en fait, qu'il est constant, que le défendeur est propriétaire et en possession de l'immeuble dont il s'agit et sur lequel repose l'hypothèque des demandeurs, et qu'il l'était lors de l'institution, pour l'avoir acquis, comme il est expliqué dans les écritures des parties. Attendu, en fait, que le défendeur, comme tiers détenteur de cet immeuble, a, le sept avril 1868, pour se faire libérer de l'hypothèque auquel il était assujetti au profit des demandeurs, fait à ces derniers des offres réelles de la somme de $697, comme la somme alors due hypothécairement, tant en principal qu'intérêts, et que le défendeur a renouvelé ses offres, par ses plaidoiries, a fait consignation de cette somme au greffe de cette cour, et demandé que les offres fussent déclarées valables et suffisantes. Attendu, en fait, que la vente à Louis Molleur, l'auteur du défendeur, du même immeuble, par Eloge Tremblay, qui avait accordé et consenti ces hypothèques, a été dûment enregistrée, longtemps avant l'enregistrement d'aucune demande ou bordereau, pour des intérêts, de la part des demandeurs contre le débiteur Tremblay. Considérant que, par la loi, le créancier hypothéeaire n'a de préférence que pour deux années d'intérêts et ceux échus sur l'année courante, que le tiers détenteur ne peut être condamné à délaisser que s'il refuse de payer la créance, en principal et les intérêts conservés par l'enregistrement; et que le créancier n'a d'hypothèque, pour le surplus d'intérêts que peut devoir le débiteur personnel, que par l'enregistrement d'une demande spéciale pour intérêts. Considérant que le défendeur avait intérêt et droit, pour éviter procès et vider ses mains, de demander la libération et décharge de l'hypothèque dont son héritage était grevé et de faire le paiement de la dette dont l'héritage était grevé au créancier de cette dette. Considérant que la somme de $697, offerte avant l'action et consignée sur le refus du créancier, était toute la somme pour laquelle le défendeur, comme le tiers détenteur, était légalement obligé hypothécairement, et la somme que les demandeurs pouvaient seulement réclamer de lui, comme tiers détenteur, par leur action hypothécaire. Considérant que ces offres étaient valables et suffisantes, et que le défendeur, en les renouvelant et en les consignant, a mis les demandeurs en demeure de recevoir tout ce qu'ils pouvaient réclamer hypothécairement contre le défendeur, comme tiers détenteur, déclare les offres valables et suffisantes, en donne acte au défendeur, et de leur consignation, comme équivalant, quant au défendeur, à paiement fait du jour des premières offres. Ordonne au protonotaire de payer les deniers et somme consignés aux demandeurs, en paiement et pour décharge de

l'hypothèque de ces deniers, sur l'immeuble en question, déboute les demandeurs de leur action."

BETHUNE, C. R., pour l'appelant : The legality of this decision turns on the true interpretation of the 37th and 38th sections of ch. 37 of the Cons. Stat. of L. C. Section 37 enacts: " No *creditor* shall be entitled, by reason of the " registration of a hypothec or privilege, to a *preference* " before *others*, for more than two years' arrears of interest " and the interest for the current year..., unless his claim " for arrears of interest to a specific amount, beyond the " arrears of two years, has been separately registered, &c." Then section 38 enacts: " The hypothec preserved by the " registration of any claim to interest or arrears, *not* pre- " served by the *original* registration, *shall date only from* " *the registration of such claim*, &c." The doctrine enunciated in the judgment is, that plaintiff can have *no hypothec at all*, for any arrears of interest, beyond the two years and the current year, unless a separate claim therefor be registered. Now, it is most respectfully submitted that such a doctrine can in no way be deduced from the terms of the statute, which are *limited* to the regulation of the *rank* or *priority* of hypothec amongst *rival creditors*. When the 38th section provides that the hypothec shall *date* only from the time that the claim for arrears of interest is registered, it clearly admits that the hypothec itself *exists, irrespective of any registration*, and that the effect of registration is merely to give the hypothec a specific *rank or preference*. The object of the legislation in question was manifestly not intended to affect the mere hypothec of the creditor, but simply to confine its preferential character, as regards arrears of interest to two years and the current year. And,although the law, as laid down in the Consolidated Statutes, seems, sufficiently plain in this respect, yet, a reference to the language of the original registry Ordinance itself, places the matter, if possible, in a still clearer light. The enactment is in the 16th section of the 4th Vict., ch. 30, and declares that, for the unregistered arrears of interest, the creditor shall not have any " preference or priority before the *other creditors*." Thus clearly establishing, that it is only as *between contending creditors*, any question can be raised at all with regard to arrears of interest unprotected by specific registration thereof.

Le jugement de la Cour d'Appel, infirmant le jugement de la cour de première instance, est comme suit: " La Cour, considérant que, de droit commun, l'intérêt suit le rang de l'hypothèque ou privilége attaché au capital qui le produit; qu'il n'en est autrement que lorsqu'il en est ainsi ordonné par quelque loi particulière, spécialement décrétée à cet effet, et

que cette loi, lorsqu'elle existe, doit être restreinte dans ses strictes limites et ne doit pas être étendue aux cas qu'elle n'a pas inclus ; considérant que les clauses trente-sept et trente-huit du chapitre 37 des Statuts Refondus du Bas-Canada, sur lesquelles est fondé le jugement dont est appel, contiennent des dispositions de l'espèce sus-mentionnée, ayant pour effet et ayant l'effet de changer la loi commune, pour un cas particulier, savoir pour le cas où deux créanciers hypothécaires se présentent, par concurrence, à la distribution du produit d'un immeuble qui leur est hypothéqué, décrètent que le créancier antérieur n'aura sur celui qui lui est postérieur, préférence à l'encontre de ce dernier, que pour deux années seulement d'intérêt et pour l'année courante, à moins d'un enregistrement spécial de la part de ce créancier antérieur ; considérant que ces dispositions ne sauraient, d'après leur nature, être étendues à d'autres cas qu'à celui qui est mentionné, ni être appliquées au cas du détenteur d'un immeuble poursuivi hypothécairement par un créancier ; considérant que, pour ces raisons, les demandeurs appelants avaient droit de faire déclarer hypothéqué en leur faveur l'immeuble possédé par le défendeur intimé, pour le montant des obligations produites, et aussi pour tous les intérêts non prescrits, échus sur chacune d'elles, et non pour deux années seulement et la courante, tel que déclaré par ledit jugement, et que, partant, les offres faites et consignées de la part dudit intimé, sont insuffisantes et doivent être déclarées telles ; considérant que, pour ces raisons, il y a erreur et mal jugé dans le jugement dont est appel, rendu par la Cour Supérieure siégeant à Iberville, le vingtième jour de novembre 1868, casse et infirme ledit jugement et, procédant à rendre celui qui aurait dû être rendu, dit et déclare que l'immeuble, décrit en la déclaration et possédé par le défendeur intimé, est affecté et hypothéqué en faveur des demandeurs pour le montant des trois obligations sur lesquelles est portée l'action, formant la somme de cinq cent cinquante-trois piastres ($553), avec intérêt au taux de douze par cent sur la somme de cent cinquante piastres, montant de l'obligation du vingt-sept mai 1862, et à compter du premier avril 1863, sur celle de deux cent trente-une piastres, montant de l'obligation du onze décembre 1863, à compter du onze décembre 1864, et sur celle de cent soixante-douze piastres, montant de l'obligation du vingt et un mars 1864, à compter du vingt et un mars 1865, jusqu'à parfait paiement ; qu'en conséquence le défendeur intimé sera tenu, sous quinze jours de la signification des présentes, de délaisser ledit immeuble, pour icelui être vendu sur le curateur qui sera créé au délaissement, à défaut de ce faire, sous ledit délai, que ledit immeuble sera saisi et vendu sur ledit défendeur en la forme

ordinaire, à moins que, sous le même délai, ledit défendeur intimé, ne paie le montant de la présente condamnation en principal et intérêt, tel que plus haut mentionné."

L'Honorable M. le Juge Badgley était aussi d'opinion d'infirmer le jugement de la Cour Supérieure, mais pour d'autres motifs que ceux mentionnés dans le jugement de la Cour d'Appel. (14 *J.*, p. 125; 2 *R. L.*, p. 183, et 3 *R. L.*, p. 358)

S. BETHUNE, C. R., avocat des appelants.

LEBLANC & CASSIDY, avocats des intimés.

MEDECIN.—PREUVE.

COUR DE CIRCUIT, Montréal, 15 octobre 1869.

Coram TORRANCE, J.

WHYTE *vs* DEBONALD.

Jugé: **Que, depuis la passation du Statut de Québec de 1869, 32 Vict., ch. 32, amendant l'article 2260 du Code Civil, savoir depuis le 5 avril 1869, un médecin a le droit de prouver la nature et la durée de ses soins durant cinq années pour tels soins rendus avant la passation de ce statut.**

Le demandeur, en sa qualité de syndic officiel à la faillite de J. C. Frank, poursuivit le défendeur, pour une somme de $164, par une action rapportée le 2 avril 1869. Le défendeur opposa en compensation à cette demande un compte pour visites, soins et médicaments, en sa qualité de médecin, rendus au failli et à sa famille. Le défendeur établit, par son serment, comme témoin, la nature et la durée des soins professionnels par lui rendus depuis le 8 février 1868 jusqu'au 2 décembre 1868, et en prouva la valeur par témoins. La preuve faite par le défendeur, en sa qualité de médecin, en vertu des dispositions du Statut de Québec de 1869, 32 Vict., ch. 32, sanctionné le 5 avril 1869, subséquemment à cette transaction, fut déclarée valable, attendu qu'en fait de preuve et de procédure, cette loi doit régler la manière d'administrer la preuve.

"The Court, considering that plaintiff hath failed to prove the allegations of his declaration, and that, by the enactment of the 32d chapter of the Statutes of the Province of Quebec, passed in the 32d year of Her Majesty's Reign, amending the 2260th article of the Civil Code, it was competent to defendant, since the 5th April, 1869, to prove, as he hath done, by his own oath, the nature and duration of the services rendered by him to the insolvent Frank and his family and *employés;* considering that defendant hath proved, by legal evidence, the allegations of his pleas, and, particularly, that the claim of Frank was exaggerated and exorbitant, and that Frank was, before and at the time of the institution of this action,

indebted to defendant in the sum of $150 and upwards, for medicines and services, as a medical man and physician, doth maintain said plea and dismiss plaintiff's action." (14 *J.*, p. 133, et 2 *R. L.*, p. 183)

GILMAN, avocat du demandeur.

LAFRENAYE & ARMSTRONG, avocats du défendeur.

EXCEPTION PRELIMINAIRE.—DEPOT.

COUR DE CIRCUIT, COMTÉ D'YAMASKA,
Saint-François-du-Lac, 1er juin 1869.

Coram LORANGER, J.

ALIE *vs* HAMELIN.

Jugé: Que dans les causes au-dessous de $60, le plaidoyer contenant une exception préliminaire doit être reçu sans dépôt.

Le demandeur poursuivit le défendeur, par une action d'*assumpsit*, pour la somme de onze chelins, et l'assigna comme résidant et domicilié en la paroisse de Saint-Thomas-de-Pierreville. Le défendeur produisit, *sans dépôt*, une exception péremptoire à la forme, par laquelle il alléguait être domicilié à Saint-François-du-Lac, et non à Saint-Thomas-de-Pierreville, se disait mal assigné et concluait à être mis hors de Cour, avec dépens. Le défendeur avait payé seulement les honoraires du greffier sur une contestation. Le demandeur répondit que l'exceptiondu défendeur ne pouvait être maintenue, parce que, entre autres raisons, elle n'était pas accompagnée du dépôt requis par la loi et les règles de pratique, et nia les allégations de l'exception à la forme du défendeur. La question du dépôt fut de suite écartée par le juge, qui déclara que les règles de pratique n'exigeaient tel dépôt que dans les causes au-dessus de $60. Dans le cas où l'on aurait exigé un dépôt de $4, dans les causes au-dessous de $60, les exceptions préliminaires auraient souvent rapporté aux procureurs des honoraires beaucoup plus élevés que n'en auraient donné les plaidoyers au fond dans les mêmes causes; ce qui paraissait un véritable contre-sens qu'il fallait éviter. D'ailleurs, aucune règle de pratique n'exigeait tel dépôt dans les causes au-dessous de $60, et le tarif n'y pourvoit pas. La pratique constante dans le district de Québec est de n'exiger de dépôt sur les exceptions préliminaires que dans les causes au-dessus de $60. Et la question du dépôt décidé, le défendeur procéda à la preuve de son *exception* qui fut maintenue avec dépens. (14 *J.*, p. 134, et 2 *R. L.*, p. 184)

ONÉSIME CARON, pour le demandeur.

J.-G. D'AMOUR, pour le défendeur.

TRANSPORT DE CREANCE.—ACCEPTATION.

COUR SUPÉRIEURE, EN REVISION,
Montréal, 30 novembre 1869.

Coram MONDELET, J., BERTHELOT, J., TORRANCE, J.

MCDONALD *et al. vs* GOYETTE, *et* MCDONALD *et al.*, demandeurs en garantie, *vs* HENRY THOMAS *et al.*, défendeurs en garantie.

Jugé: Que le débiteur qui a accepté la signification d'un transport n'est plus recevable à plaider erreur quant au montant dû par lui au cédant.

" La Cour Supérieure, siégeant à Montréal, présentement comme Cour de Revision, considérant que le défendeur, Dominique Goyette, est mal fondé en son exception, à l'encontre de la demande des demandeurs principaux, attendu qu'ayant accepté les transports dont il est question et reconnu la dette comme sienne, et s'étant obligé de la payer comme y appert, n'est plus recevable à plaider erreur quant au montant dû par lui aux cédants ; considérant que les demandeurs principaux ont fait preuve des allégués de leur déclaration ; considérant qu'il y a erreur dans le jugement dont est appel, du 20 juin 1868 ; cette cour casse, annulle et met au néant ledit jugement, et, rendant celui qu'aurait dû rendre ladite cour, déboute Dominique Goyette de son exception, avec dépens tant de la demande principale que de la demande en garantie à laquelle la mauvaise contestation de Goyette a donné lieu, et condamne Dominique Goyette à payer aux demandeurs *principaux* la somme de $1556.80, avec intérêt sur icelle au taux de dix par cent à compter du 12 mai 1866 jusqu'à paiement." (14 *J.*, p. 137. et 2 *R. L.*, p. 184)

J.-G. MACDONALD, avocat des demandeurs principaux.
DELAGRAVE, avocat des défendeurs en garantie.

COUR DE REVISION.—REVISION DE MEMOIRE DE FRAIS.

COUR SUPÉRIEURE, EN REVISION, Montréal, 28 février 1870.

Coram MONDELET, J., BERTHELOT, J., MACKAY, J.

BELISLE *vs* LYMAN *et al.*

Jugé: Que la Cour de Revision n'a pas juridiction pour reviser la taxe d'un mémoire de frais de revision. (14 *J.*, p. 137, et 2 *R. L.*, p. 185)

DOUTRE, DOUTRE et DOUTRE, pour le demandeur.
PERKINS et RAMSAY, pour les défendeurs.

COMPENSATION.

COURT OF REVIEW, Montreal, 31st January, 1870.

Coram MONDELET, J., MACKAY, J., TORRANCE, J.

BELISLE *vs* LYMAN *et al.*

Held: That damages given for illegal and unwarranted attachment, *saisie-arrêt*, may be compensated by debt due upon which *saisie-arrêt* issued. (1)

At St-John's, district of Iberville, defendants, Lyman, Clare & Co., by their attorney, Hungerford, issued, for debt due them upon account, a *saisie-arrêt* before judgment, and also proceedings in compulsory liquidation in insolvency. The attachment was not returned and the proceedings in insolvency were discontinued. The present action of damages for such illegal seizures followed, and among other pleas, defendants (denying damage) offered, in compensation to any sum awarded for damages, the sum of $182, due them by plaintiff. The action was dismissed, with costs, by the Superior Court, at Iberville (SICOTTE, J.), upon other grounds, but the judgment was reversed in Review, and judgment rendered as follows:

"The Court, considering that defendants, at the time they brought plaintiffs into the Court of Insolvency, had no right to do so, inasmuch as they were his creditors to the amount of $182 and no more; considering, nevertheless, that the damage was caused solely by the aforesaid act of defendants, inasmuch as, at the time of the issuing of the attachment, plaintiff was actually in a state of insolvency; considering that there is error in the judgment appealed from of the said 19th June, 1869, dismissing plaintiff's action, inasmuch as defendants had no right to cause the said attachment to be issued as it has been; this Court doth reverse, annul and set aside the said judgment, and, proceeding to render the judgment which should have been rendered by the Court below, it is ordered and adjudged that defendants do pay and satisfy to plaintiff ten dollars *dommages et intérêts*, and ten dollars costs, with costs also in this Court, distraction of which said several costs awarded to Laberge and Paradis, attorneys for plaintiff; and, as to the ten dollars *dommages et intérêts*, its amount is declared compensated by larger amount which this Court finds to have been and to be due to defendants by plaintiff, before and at the time of the committing, by defendants, of the grievances charged against them." (15 *J.*, p. 305)

LABERGE and PARADIS, attorneys for plaintiff.

DOUTRE, DOUTRE and DOUTRE, attorneys in review.

PERKINS and RAMSAY, attorneys for defendants.

(1) V. art. 1188 C. C.

TRIAL BY JURY.

SUPERIOR COURT, Montreal, 23rd February, 1870.

Coram BEAUDRY, J.

MATTHEWS *vs* THE NORTHERN ASSURANCE COMPANY.

Held: That option of trial by jury, made in the plaintiff's answer, can only avail him as a notice to the opposite party, and must be followed by a special application to the Court, within four days after issue joined, or not later than the first day of next term. C. C. P., art. 350.

BEAUDRY, J.: The plaintiff makes application for a jury trial, and the motion is resisted on the part of defendants, on the ground that option of a jury trial was not made in the declaration or pleas, nor within four days after issue joined, as required by art. 350 C. C. P. The plaintiff meets this objection by saying that he made option of a jury trial in his answer and thus complied with the law which allows the option to be made within four days after issue joined. I am of opinion that the making option of a jury trial in the answer was a sufficient notice to the opposite party, but the motion should been made within four days after issue joined, or, if the four days expired out of term, on the first day of the next term. The plaintiff in the present case has not made his motion till the fourth or fifth day of the next term, and I hold that the application comes too late. Motion rejected. (14 *J.*, p. 138, et 2 *R. L.*, p. 185)

PERKINS and RAMSAY, for the plaintiff.

CUSHING and TRENHOLME, for the defendants.

PROCEDURE.—ENQUETE.

SUPERIOR COURT, Montreal, 31st December 1870.

Coram TORRANCE, J.

MATTHEWS *vs* THE NORTHERN ASSURANCE COMPANY.

Held: That, when the plaintiff in his case in chief has adduced evidence to repel the case of the defendant as disclosed in his plea, he cannot adduce evidence of the same kind in rebuttal.

This was a motion by defendant, to revise a ruling at *Enquête* which rejected an objection by defendant, to the examination by plaintiff, of a witness in rebuttal, with regard to matters that he had already gone into in his evidence in chief; the plaintiff, in his case in chief, having gone into evidence generally to repel the case of defendant as disclosed in his plea.

PER CURIAM: "Considering that plaintiff, before he closed his case, adduced evidence to repel the case of defendant, especially by the disposition of Robert Alsop, a witness for plaintiff, for the purpose of proving the safety of gasoline machines; doth grant the motion, so far as to maintain the objections made by defendant to the evidence of the witness John Baker Edwards, with costs." (16 *J.*, p. 82, et 4 *R. L.*, p. 67)

PERKINS and RAMSAY, for plaintiff.

N.-W. TRENHOLME, for defendant.

ASSURANCE CONTRE L'INCENDIE.

COUR SUPÉRIEURE, Montréal, 31 mai 1871.

Présent: MONDELET, J.

MATTHEWS *vs* THE NORTHERN ASSURANCE COMPANY.

Jugé: Que placer dans les bâtisses assurées une machine à gasoline, d'une nature dangereuse, sans le consentement de l'assureur, est une violation de la police. (1 *R. C.*, p. 475, et 3 *R. L.*, p. 450)

SUMMONS.

COURT OF QUEEN'S BENCH, Montreal, 16th September, 1875.

Coram DORION C. J., MONK, J., TASCHEREAU, J., RAMSAY, J. and SANBORN, J.

SMITH, appellant, *and* DONOVAN, respondent.

Held: That, when the defendant is personally served at a place other than his domicile, the delay is computed according to the distance from the place of such service (and not according to the distance from his domicile) to the place where the court is held (1).

(1) Le § 2 de la sec. 170 du ch. 83 des Statuts Refondus du Bas-Canada de 1861, intitulé: "Acte concernant la procédure ordinaire dans la Cour Supérieure et la Cour de Circuit," était en ces termes: "Ledit bref d'assignation pourra être dressé et fait suivant la formule contenue dans la cédule L annexée au présent acte, et sera signifié au moins cinq jours (au nombre desquels ni le jour de la signification ni le jour du rapport ne seront comptés) avant celui fixé pour le rapport dudit bref, s'il n'y a pas plus de cinq lieues du lieu où la signification a été faite à la place où la cour siége; et si en aucun tel cas il y a plus de cinq lieues, alors il faudra un délai d'un jour de plus par chaque cinq lieues additionnelles; et tel bref d'assignation pourra être adressé à un huissier de la cour supérieure, nommé pour le district dans lequel il a émané, et ledit huissier sera tenu de le mettre à exécution." L'art. 1066 C. P. C. n'a pas modifié les dispositions de ce paragraphe, et le délai d'assignation doit être calculé d'après la distance du lieu de la signification au lieu des audiences du tribunal, et non du domicile du défendeur, et qu'ainsi dans

The writ of summons was issued in the Superior Court, at Montreal. The defendant, Smith, was described as being of Onslow, in the district of Ottawa, admitted to be about 160 miles from Montreal. The service was made upon defendant personally, at Montreal, and the delay between service and return was only eleven days. The defendant fyled an *exception à la forme*, on the ground that the delay was insufficient, and should have been computed according to the distance from defendant's domicile to the city of Montreal. The plaintiff's counsel relied upon the decision of the majority of the Court of Review in *Currier* vs *Lafrance*, 13 L. C. Jurist, p. 329, and 19 *R. J. R. Q.*, p. 435, which was directly in point.

BEAUDRY, J., in rendering judgment in the Superior Court, at Montreal, on the 23d day of February 1870, said the case came under article 75 C. P. C: "In ordinary cases the delay upon summons is ten intermediate days between the day of service and the day fixed for the appearance, when the distance from the domicile of defendant to the place where the Court is held does not exceed five leagues. When the distance exceeds five leagues the delay is increased one day for each additional five leagues." His Honour believed it was the intention of the codifiers that this article should also apply to cases where the service is made at a place other than defendant's domicile. The exception must therefore be maintained.

The judgment of the Superior Court is as follows: "The Court, considering that, under art. 75 of the C. C. P., the delay upon summons, in ordinary cases, is ten intermediate days between the day of service and the day fixed for the appearance, when the distance from the domicile of defendant to the place where the Court is held does not exceed five leagues, and when the distance exceeds five leagues the delay is increased one day for each additional five leagues; and considering that it is admitted by plaintiff that the distance from the domicile of defendant to the city of Montreal is about 160 miles, and that only eleven days elapsed between the day of service of the writ of summons in this cause and that of its return, which delay is insufficient; doth maintain the said *exception à la forme*."

The plaintiff inscribed in review, and, on the 30th April, 1870, the Court of Review, at Montreal, BERTHELOT J., MACKAY J., et TORRANCE J., reversed the judgment of the Superior Court. Here follow the remarks of Judge MACKAY in review and the judgment of the Court.

le cas où un défendeur est assigné à une distance plus rapprochée du lieu des audiences du tribunal que ne l'est son domicile, le délai d'assignation pourra être moindre qu'il n'eût été si l'assignation eût été faite à son domicile. (*Currier* vs *Lafrance*, C.S.R., Montréal, 30 octobre 1869, MONDELET, J., dissident, BERTHELOT, J., et TORRANCE, J., confirmant le jugement de C. C., Aylmer, 13 J., p. 329, et 19 R. J. R. Q., p. 435)

MACKAY, J.: The point has already been decided by the Court of Review in *Currier* vs *Lafrance*, 13 L. C. Jurist., p. 329, and 19 R. J. R. Q., p. 435. The additional delay is allowed to give the defendant time to travel, and he does not need that when he is served at the place where he is summoned to appear. We hold that the exception is unfounded.

"The Court, considering that there is error in the judgment of the 23d of February, 1870, in maintaining the exception *à la forme*, doth. revising such judgment, reverse the same, and, proceeding to render the judgment that ought to have been rendered in the premises. Considering that the service of process was well enough made upon defendant, as made to hold defendant to appear and to defend himself. Considering that defendant was personally served in Montreal with the writ and declaration, and that there is no violation of substance or sense of any article of the Code of Procedure in holding that defendant, under the circumstances, was bound to appear according to the exigency of the writ, and to defend himself, if he saw fit, and that his exception *à la forme* was and is unfounded, doth declare said exception *à la forme* unfounded and insufficient, and doth reject the same."

Smith appealed from the judgment of the Court of Review, and the Court of Appeals confirmed the judgment. Here follow the remarks of chief justice DORION in rendering the judgment of the Court of Appeals:

DORION, Ch. J.: There are two questions raised by the present appeal, one as to the sufficiency of the service of the original process and the other on the merits. On both points, we are against appellant; this court agreeing to accept the jurisprudence on the question of form, as established by the judgment of the Superior Court. The judgment appealed from is, therefore, confirmed. (14 *J.*, pp. 138 et 222; 2 *R. L.*, p. 185, et 19 *J.*, p. 336)

PERKINS, MCMASTER and PRÉFONTAINE, for appellant.

KELLY and DORION, for respondent.

WILLS.

PRIVY COUNCIL, 3rd February, 1872.

On appeal from the Court of Queen's Bench, for Lower-Canada (appeal side).

Present: Sir James-William COLVILLE, Sir Robert PHILLIMORE (Judge of the High Court of Admiralty), Sir Montague-Edward SMITH and Sir Robert-Porrett COLLIER.

LOUISA MIGNEAULT, appellant, *and* EULALIE MALO and JEAN-BAPTISTE BROUSSEAU, respondents.

M. domiciled in Lower-Canada, in 1865, (before the Civil Code of Lower-Canada came into operation) being dangerously ill, sent for a notary to make his will. The notary attended with two witnesses, and M. expressed verbally before them the provisions he intended to make by his will, including an annuity to A. The notary inquired of the witnesses if they understood M.'s wishes, and they said that they did, whereupon the notary proceeded to reduce M.'s expressed intentions into writing, in the form of a solemn will according to the French law, and had written down as far as the bequest of the annuity to A., but before a disposition in favour of his only daughter and appointment of executors was written, M. died. The two witnesses, at the notary's request, at once made a declaration in writing of what M.'s intentions were regarding the disposition to be made by his will. A. petitioned the Superior Court of the Province for probate of the partly prepared testamentary paper, and that court granted probate of the imperfect instrument with the written statement of the witnesses, as containing the will of the deceased. M.'s heir was cited and opposed the grant. A. afterwards brought an action for payment of the annuity. In defence to the action M.'s heir disputed the validity of the will. The Superior Court gave judgment for A. on the ground that the sentence of the court granting probate was conclusive; the Court of Queen's Bench in Lower-Canada reversed that judgment. On appeal, held by the Judicial Committee:

First, that according to the uninterrupted practice and usage of the Courts in Lower-Canada since 1801, on the construction of the Colonial Act, 41st Geo. 3, c. 4, s. 2, the grant of probate was not, as in England, conclusive, and that it was competent to M.'s heir to impugn the will by way of defence to A.'s action.

Secondly, that although M. intended to make a will according to the French law, and the imperfect testamentary paper was void as a will by that law, yet that the verbal bequest, coupled with the unfinished testamentary paper, was a good bequest as respected personalty, and entitled to probate, as the Imperial Statute, 14th Geo. 3, c. 83, s. 10, introduced the English law, as to wills existing at that time, into Lower-Canada, and carried with it the rules of the English courts as to the admissibility of oral evidence in cases of nuncupative wills or unfinished testamentary dispositions of personalty.

In this case the question raised respected the right of the appellant to an annuity bequeathed to her by one Prudent Malo, a merchant of Belœil, in Lower-Canada, and domiciled there, and the effect, according to the law of Lower-Canada,

of probate in the Canadian courts to an unexecuted testamentary paper, as a will, in the form prescribed by English law. The facts were there: The action was brought by the appellant against the respondents to recover the arrears of an annuity bequeathed by Malo. The declaration was filed in 1866, and alleged that Prudent Malo died on the 25th April, 1865, and left an only daughter, the respondent, Eulalie Malo (the wife of the other respondent, Jean-Baptiste Brousseau), who had succeeded to and taken possession of the estate of her deceased father; that Prudent Malo, on the 25th April, 1865, made his will, duly executed according to law in so far as regards moveables, and by his will left the plaintiff an annuity of £25 for her life; that the will was duly proved before Assistant Justice MONK, and probate of it granted on the 27th of December, 1865; that it cost the plaintiff £25 to obtain the probate, which she alleged that she had a right to recover from the defendants, who had unjustly and in bad faith contested the will, and that, on the 25th of August then last past, sixteen months of the annuity was due to the plaintiff, amounting to the sum of £33 6s. 8d. The plaintiff filed with the declaration copies of the probate of the testamentary paper of Malo, and of the proceedings and evidence which preceded its grant. From these proceedings it appeared that the plaintiff had, on the 20th July, 1865, presented a petition to the Superior Court of Montreal praying for probate of the will of Malo, and had cited the defendants to appear, as representing the succession of the testator; that the defendants appeared and contested the grant of probate, and that plaintiff called several witnesses and, amongst others, Elzéar Blanchard, who produced a paper writing, which contained the testamentary wishes of the deceased, as expressed by him before three persons present at the time, and immediately before his death, and which was written immediately afterwards; and another witness, J.-B. Brillon, who produced an unfinished will, the writing of which was interrupted by the death of the testator, but which contained a bequest to the plaintiff of the annuity in question. The defendants having declined to call witnesses and having been heard by their counsel, the court, on the 27th December, 1865, gave judgment granting probate of the above two papers and ordering them to be registered on the registry of probate of the court. The defendants pleaded a special plea, which, in effect, alleged that the will was not properly executed, that the probate of it was null and void, that the proofs adduced were irregular and ought not to have been admitted, and that plaintiff was not entitled to the costs of proving it. They also pleaded the general issue. The plaintiff joined issue on the pleas, and also

demurred to the first plea on the ground that the defendants were not entitled to question the probate. By consent of the parties, the evidence given on the proceedings in the Superior Court for the probate of the testamentatry papers, a copy of which had been filed by the plaintiff with her declaration, was admitted as given in the action. This evidence consisted of the depositions of four witnesses: Elzéar Blanchard, Jean-Baptiste Allard, Vilbon Blanchard, Joseph-R. Brillon, and two paper writings produced in evidence by Elzéar Blanchard and Joseph-R. Brillon. From this evidence it appeared, that, on the 25th of April, 1865, Malo, being ill and having been told by his doctor that he was not likely to survive long, sent for Brillon, a notary, to make his will. Brillon told him that it was necessary that there should be two witnesses, and that when they were present he ought to say and explain in their presence what he intended to do. Malo accordingly directed him to send for Vilbon Blanchard and Elzéar Blanchard for that purpose. Vilbon Blanchard and Elzéar Blanchard having arrived and being alone in the room with the deceased and Brillon, the deceased said: "I wish to make my will," and then stated the disposition of his property which he wished to make, and which he had previously stated in the morning, in similar terms, to Brillon, the notary, and afterwards to Dr Allard, one of the executors. When he had finished, Brillon, the notary, asked the two other witnesses if they had understood the testator's wishes, and, on their saying "yes," proceeded to write out the will. While he was doing so and when he had completed the clause relating to the bequest of the plaintiff, the testator fell back in his chair and expired. Brillon then ceased writing and with the witnesses went into a neighbouring room, and within half an hour of Malo's death drew up a statement of his testamentary wishes, as he had expressed them, including the bequest of an annuity to the plaintiff. The statement so drawn up and the unfinished will written by Brillon were the two papers of which probate was granted by the court (1). On the 31st May, 1867, the Superior Court, Mr. Justice BERTHELOT presiding, gave judgment in favour of the plaintiff for £43 15s., being £25 for one year's annuity, and £18 15s. for the costs of proving the will.

Here follows the judgment of the Superior Court: "La Cour, vu que, par sentence et jugement, en date du 27 décembre 1865, rendu par l'Honorable Samuel-Cornwallis MONK, un des juges de cette cour, il a été prononcé que la vérification ou *probate* du testament ou dispositions testamentaires de Prudent Malo comme ayant été fait et dicté par lui, en date du 25 avril 1865, avait été faite bien et dûment, et que les-

(1) These documents are set out in the judgment, *post*, pp. 70 and 71.

dites dispositions testamentaires avaient été bien et dûment prouvées ; vu que ladite sentence du 27 décembre 1865 est dans toute sa force et vertu, et doit avoir tout l'effet que lui donne la loi ; considérant que lesdites dispositions testamentaires ainsi prouvées contiennent un legs au profit de la demanderesse d'une rente viagère annuelle de £25 par année, payable chaque année à compter du jour de son décès, et que, par ladite sentence du 27 décembre 1865, il y a eu adjudication de frais au profit de ladite demanderesse alors requérante pour la preuve et la vérification desdites dispositions testamentaires, contradictoirement avec les défendeurs et contre ces derniers, et dépens taxés à la somme de £18 15s. par ledit Honorable Samuel-C. MONK ; la cour, en conséquence, a condamné la défenderesse à payer à la demanderesse la somme de £43 15s., savoir £25 cours actuel pour une année de ladite rente annuelle due et échue au 25 avril 1866, et £18 15s. pour les frais adjugés au profit de la demanderesse par la sentence ci-dessus mentionnée, le tout avec intérêt sur ladite somme de £43 15s. depuis le 13 septembre 1866, jour de la signification, et dépens d'une action de la première classe à la Cour de Circuit."

Defendant having inscribed the cause for revision before three judges of the Superior Court of Montreal, consisting of the Justices MONDELET, BERTHELOT, and MONK, sitting as a Court of Revision, that court, on the 28th March, 1868, affirmed the judgment of the 31st of May, 1867, Mr. Justice MONDELET, dissenting.

Here follow the remarks of the judges in review :

MONDELET, J., in dissenting from his learned brothers, believed his present opinion to be in strict harmony with that expressed when sitting in Queen's Bench upon the case of *Colville* and *Flanagan* (1). The paper writing under consideration conformed to no form of law by which it could be recognized as a will. Neither the formalities of the English or French laws have been observed, and these few lines of writing were not a will, nor could the probate made be recognized as legal. Objections have been made to it at the time, but without suc-

(1) Un testament, dûment exécuté devant trois témoins, peut être modifié en ces différents legs par des chèques signés en présence de deux témoins par le testateur pendant sa dernière maladie et laissés entre les mains de son secrétaire particulier pour être remis "comme donations à cause de mort" aux parties à l'ordre desquelles ces chèques ont été faits ; et la vérification du mémorandum des legs faits au moyen desdits chèques, mémorandum écrit par le secrétaire particulier en présence des membres de la famille du testateur, à la demande de ce dernier qui, après lecture, l'a approuvé, est suffisante pour donner droit aux légataires de se faire adjuger les sommes ainsi léguées sans qu'il y ait vérification desdits chèques. (*Colville et al.* et *Flanagan*, C. B. R. en appel, Montréal, 1er mars 1864, DUVAL, J. en C., MEREDITH, J., MONDELET, J., BADGLEY, J., confirmant le jugement de C. S., Montréal, 22 septembre 1862, MONK, J., 14 D. T. B. C., p. 328 ; 8 J., p. 225, et 13 R. J. R. Q., p. 56)

cess. To recognize this document as a will would be to open a way for dishonest and intriguing persons to claim possession of successions. The utmost vigilance was necessary to protect property, and its rights should be rigidly guarded. The learned judge, in referring to *Colville* and *Flanagan*, a case cited at the argument, said that it was founded upon certain cheques, which had been handed to Hopkins, then private secretary to Sir George Simpson. They were not in the form of a legacy, but of a *don manuel*, and His Honor had so held at the time. The present case was similar in its features, and His Honor saw no cause to reverse his original opinion. He, therefore, dissented from the judgment about to be pronounced.

BERTHELOT, J., was of opinion that the judgment should be confirmed. P. Malo had received much kindness from plaintiff and it was natural that he should desire to show his gratitude. The defendant was acting unjustly in endeavoring to deprive her of the legacy given. It appears that a notary was called in and proceeded in the presence of witnesses, to bequeath Malo's property, in accordance with his instructions, to various persons. Among the bequests was one of £25 to plaintiff. Before the completion of the will, however, the testator was seized with a fit of apoplexy and died. A *procès-verbal* was at once drawn up and signed by the persons present, of the wishes of Malo, and the events attending his death. No better *commencement de preuve par écrit* could be wished for, and, in the face of unquestionable corroborative evidence, to do otherwise than recognize the bequest would be an injustice. Referring to the *Lambert* and *Gauvreau* case, settled in appeal (7 D. T. B. C., p. 277; 1 J., p. 206; 5 R. J. R. Q., p. 244, et 12 R. J. R. Q., p. 410), His Honor said that, then, the principle was held that a testament need not necessarily be *solennel*, or that a will intended to be of that nature should be absolutely made in accordance with the most minute formalities, since it could be recognized as valid under other provisions of the law. The probate made was good in law and, further, had not been taken *ex parte*, but in the presence of the parties. Only a small amount was involved in this case, but it was bequeathed in recognition of eight years of faithful service, and the court was pleased that the law permitted it to do an evident act of justice.

MONK, J.: The evidence shows beyond question that the testator made this bequest, while in sound mind, and of his own will. Neither fraud nor surprise are urged by the defence. The facts of the case are proved beyond doubt. His Honor confessed to have felt some hesitation when the probate was prayed for, in 1867, but, upon further examination, found that Malo had intended to make a legacy, and was cut off

before this intention, already given to a notary, could be put into effect. In *Colville* and *Flanagan*, only a memorandum existed, and there was no *procès-verbal*, and nothing there showed that Sir George intended to connect it with his will. His Honor had then characterized the act as a *don manuel*, and the Court of Appeal, while confirming his judgment, did so upon the grounds that it was a legacy. His Honor was not disposed to vary from a precedent that had the sanction of the highest court in the country. The *motive* of that judgment did not make it appear that the *memoranda* in issue were testamentary bequests. In the face of this solemn decision, His Honor could not do otherwise than confirm the judgment of the court below. The record contained such proof of the intentions of the testator as would make it a rank injustice to deprive plaintiff of her legacy, because of the absence of some simple formalities. The Court would commit a violation of natural equity and of the principles laid down in the case referred to, to do other than confirm the judgment.

The defendants appealed to the Court of Queen's Bench of Lower-Canada, and that Court, consisting of Chief Justice DUVAL, and the Justices CARON, DRUMMOND, BADGLEY and LORANGER, gave judgment on the 9th of September, 1869, reversing the two judgments of the Superior Court, and dismissing the plaintiff's action with costs. Here follow the remarks of Judges CARON and BADGLEY in the Court of Appeal:

CARON, J.: Le premier jugement était uniquement fondé sur ce que le *probate* ayant été accordé, la validité du testament se trouvait établie et ne pouvait plus être contestée. En revision deux des juges ont été d'avis que l'intention du testateur Malo était apparente et prouvée de façon à ne laisser aucun doute qu'il voulait léguer à la demanderesse la rente qu'elle réclamait, et que la justice et l'équité exigeaient qu'elle lui fût accordée. Ces raisons d'équité ont bien leur valeur lorsque la loi se prête à leur donner suite, mais cette doctrine est très dangereuse, surtout lorsqu'il s'agit de testament. Pour moi, je crois bien en effet que Malo voulait léguer la rente en question, mais je ne puis l'accorder à la demanderesse qu'autant qu'elle aura établi qu'elle lui a été léguée par un acte valable et revêtu de toutes les formalités voulues par la loi. Les papiers produits et qu'elle a fait déclarer prouvés, sont-ils de nature à pouvoir être regardés comme testament valable, soit comme fait verbalement, soit comme contenu dans l'un ou l'autre des écrits produits, ou dans tous les deux ? Le jugement qui accorde le *probate* ne reconnaît pas le legs verbal que l'on invoque, ce sont les deux écrits qui sont reconnus comme le testament ; il n'est pas dit lequel, ou si, de fait, l'un

et l'autre constituent un seul et même testament, ou s'il y en a deux. Mais toujours, il n'est nullement question du legs verbal; et c'est aussi bien, car, de fait, ce legs n'est pas légalement prouvé, et l'eût-il été, qu'il n'en serait pas plus valable, soit d'après la loi française, soit d'après la loi anglaise. Quant à la question de savoir si les deux écrits, ou l'un d'eux, constituent un testament valable d'après la loi anglaise, comme la la chose est prétendue de la part de l'intimée, je ne crois pas nécessaire de discuter ce point, car je suis d'avis que le fait que le testateur est mort avant d'avoir complété ses dispositions, suffit pour frapper de nullité ce qui est contenu auxdits actes. Qui sait en effet, si, dans ce qui restait à faire, il ne se serait pas trouvé une clause qui aurait modifié, ou même annulé tout à fait, sous certaines contingences, le legs fait à l'intimée? Pour cette raison (le décès du testateur avant d'avoir complété ses dispositions), je crois que les jugements en cour supérieure et en revision doivent être infirmés, et l'action rejetée.

BADGLEY, J.: The features of the cause are peculiar, because no such known cause of action has previously been submitted to our courts of justice in this Province, and, under the provisions of our existing law, none such can arise hereafter. The pretensions of plaintiff, urged before this court, require some explanatory observations. By the old French common law of this Province, only two forms of solemn will were valid, the authentic or notarial, and the holographic. The former was executed before public officers, two notaries, or one notary and two witnesses, the testamentary dispositions were to be dictated by the testator to the instrumenting notary, who was to read the will to the testator for his approval, and to be then signed by the testator and the two notaries, or the one notary and two witnesses, as the case might be; then, it became an authentic *minute*, or notarial *acte*, having full authenticity in itself, without other proof of its execution. Without these requirements, it was merely an imperfect will and without legal effect. "Quand le testateur n'a pu achever " ce qu'il a commencé, etc., ou qu'il appert par la signature, la " date, ou autrement, que le testament ne contient pas toute " la volonté du testateur, tel testament est nul. Testament " non signé n'est valable même entre enfants." (3 Henrys, livre 5, Quest. 8; Bretonnier Cod., sect. 4, dist. 1, n° 4) in conformity with the *Ordonnance de Blois* (Isambert, *Anciennes Lois Françaises*, vol. 14, p. 420, n° 165), which decrees: "Tous " notaires, tant royaux qu'autres, soit en pays coutumier ou " de droit écrit, seront tenus faire signer aux parties et aux " témoins instrumentaires, s'ils savent signer, tous contrats et " actes, soit testaments ou autres qu'ils recevront, dont ils

" feront mention, tant en la minute que grosse (*copy*) qu'ils " en délivreront, à peine de nullité." The holographic form of will must be entirely written and signed by the testator, " écrit et signé de la main du testateur, sans autres formalités." Unlike the notarial *acte*, the holographic did not contain its own authenticity, and to give it legal effect it was required to be judicially *vérifié*. Rousseaud de la Combe, *Recueil de Jurisprudence*, v° *Testament*, p. 710, 2de col.: " Le testament et la suscription étant de mains privées, il ne fait foi qu'il n'ait été publié devant le juge, et que les témoins n'aient reconnu leurs signatures, les successeurs *ab intestat* et autres prétendant droit, appelés." 2 Despeisses, p. 86, n° 111. After verification and enregistration, official authentic exemplifications might be issued of the holographic will. It is manifest that the will in contestation here does not come within the forms of the authentic or holographic wills. By the Quebec Act of 1774, 14 Geo. III, ch. 83, sec. 10, it is provided "*that every owner of lands, goods, &c., in the Province, who had a right to alienate them in his lifetime, might devise or bequeath them by last will or testament, &c., such last will being executed either according to the forms prescribed by the law of Canada, or according to the forms prescribed by the laws of England,*" thereby introducing a third form of will into the Province. Doubts having arisen about the proof of these wills before a judge of the Civil Courts, the Provincial Act of 1801, 41 Geo. III, ch. 4, removed the doubts and declared the civil judge to be authorized to grant probate on them as by a Court of Probate. Since that time, probates have been granted by the judges of the Civil Courts, as before, in conformity with the common law of the Province and according to the recognized and admitted legal maxim "that the law of the testator's domicile is the rule for probate." The *vérification* of the common law and the probate of the statute, similar in their legal result, have effect only upon the factum of the will to be proved, and the incidents of its deposit and enregistration. The jurisdiction of the provincial probate judges does not go beyond, and, unlike that of the Courts of probate in England, does not extend to the settlement of estates of deceased persons. The powers and attributes or practice of those English Courts have not been introduced into our jurisprudence, either by positive enactment or by implication from the use of the word *probate* in the Provincial Act of 1801, whilst, at the same time, it is common knowledge that neither *vérification* nor probate is conclusive of the validity, either of the will or of any of its dispositions, nor prevents their contestation by interested parties; it is notorious that such contestations have been and are of frequent occurrence, and the

Civil Code of the Province has an express article declaring that right of contestation to be the law in force. The plaintiff's factum in this court declares the will in question to have been *made according to the English law*, and admitting its invalidity in the French form, as an authentic will, maintains its validity in the English form, and adverts to the established rule of jurisprudence, as also expressed in the 855th article of the Civil Code, that "wills purporting to be made in one form, which are void as such in consequence of the inobservance of some formality, may be valid as made in another form, if they contain all the requisites of the latter." It may be observed, upon this rule, that it is the judicial conclusion from adjudged cases, and adopted since the introduction of the English forms of will by the Act of 1774, and that it has modified the old law principle, that the will should be in the form in which the testator has chosen to make his testamentary dispositions. It is proved, and indeed not denied by plaintiff, that Malo intended to make an authentic will in French form, before a notary and two witnesses, and all the circumstances surrounding the matter are consistent only with that intention, and as, according to the recognized forms of the French law, with which French Canadians of the respectable position of the deceased are perfectly conversant, and who know that, by the French law, "un testament n'est pas une volonté présumée, mais une volonté écrite; sans la volonté, l'écriture est inutile, sans l'écriture, la volonté, quoique présumée, n'est point reconnue pour être la volonté du testateur." It is manifest that Malo's intention was to make a French notarial will, and it is not too much to assert that he never contemplated himself, nor did the notary and witnesses contemplate, the making of a will in the form prescribed by the law of England, whether written or nuncupative, forms of which it may be safely said, that neither he nor they had any knowledge whatever. The rule of jurisprudence above referred to, reposed upon the principle that the invalidity which deprived the will of legal effect, in its original form, from some informality, was independent of the execution of the will and signature by the testator, and that proposition is affirmed in all the cases from which the rule has been deduced, from the earliest reported case of *May* and *Ruiter* (1), in 1821, to the last case adjudged

(1) Le testament, qui a été reçu par un notaire et deux témoins, mais qui, à cause de l'état comateux dans lequel est tombé le testateur au moment où le notaire se disposait à le lui relire, ne lui a été relu que le lendemain de sa confection, est nul comme testament solennel, mais valide comme testament suivant la forme anglaise. (*Ruiter* et *May et al.*, C. B. R. en appel, Montréal, 20 janvier 1825, SEWELL, J., RICHARDSON, J., COLTMAN, J., SMITH, J., et HALE, J., confirmant le jugement de C. B. R., Montréal, 19 octobre 1824, REID, J., FOUCHER, J., et PYKE, J., 5 R. J. R. Q., p. 256)

by this Court, in 1868, including the case of *Lambert* et *Gauvreau*, cited by the plaintiff. They are all cases of notarial wills, signed and executed by the testators and two notaries, or one notary and two witnesses, the equivalent of the second notary, which were set aside as French authentic wills for technical informality, but validated as wills in English form as containing the requirements of the latter. The informality, *ex. gra.*, in the LAMBERT case, being that one of the witnesses had not quite attained his twenty first year as required by the article of the custom; but the want of that perfect number of years not incapacitating the witness according to the law of England. It is scarcely necessary to add that the above mentioned rule does not apply to the converse of the given proposition, and could not convert an unsigned and imperfect will in English form, into a valid authentic will in French form. The plaintiff has not strongly pressed the rule upon our consideration, and, in fact, it has no application to her case, because she adds in her factum, after the averment of the will in question being in English form, *that the will was made before the promulgation of the code which has abolished nuncupative wills for the future, and it is sufficient to establish that the will possesses all the conditions necessary for a nuncupative will.* She, therefore, places the will in question before this Court in its technical nuncupative or verbal form, as prescribed by the law of England, and supports her pretension by references to English law and English authorities, averring that the legal requisites for such nuncupative will have been implemented by the various facts and circumstances attending the making of the imperfect will before referred to and the death of Malo. Nuncupative wills were not favoured in England, and Blackstone, in his commentaries, first published in 1764 or 1765, says that they had gone into disuse before that time; and it might fairly be made a question whether the Statute of 1774 ever contemplated the introduction of the nuncupative form at all, in the words of the enactment which gave the privilege of executing a will in the forms prescribed by the law of England, when, under that law, they had fallen into disuse, even in England. Without stopping to discuss this question, it is well known that the nuncupative or verbal wills were abolished in England in 1838, they were not recognized or admitted in customary France at all, and were abolished in the civil law districts of that kingdom by the Royal Ordinance of 1735; they were neither recognized nor allowed in this Province under our common law of the *Coutume de Paris*, and, if introduced here by the Quebec Act, all doubts were removed by their final abolition by our Civil Code, which, although enacted some time before, was only promul-

gated to be in force in August, 1866. It is manifest that nuncupative wills have not been considered to deserve nor did they receive favourable consideration, and are, therefore, subject to strict scrutiny here where their existence at all is so doubtful. Such as they are, they have been defined by various English law writers, Perkins, Swinburne, Blackstone, Bacon and others, and the following definition from Bacon's Abridgment, title of *Wills and Testaments* (*D*), vol. 4th, p. 501, will be cited, as quite comprehensive and precise: "Nuncupative wills are such as are made by word, or without writing, which is, where a man is sick, and for fear that death, or want of memory or speech, should surprise him, that he should be prevented, if he stayed the writing of his testament, desires his neighbours and friends to bear witness of his last will, and then declares the same presently, by word, before them;" in other words, that the nuncupative will is made by the testator, when he is *in extremis*, and so conscious of the fact that he apprehends that he has not time sufficient to make a will in writing, and that he must declare his will in the present tense, with a view to have the very words he then utters constitute his will, and without any purpose of further revision. It is manifest that the foregoing cannot apply to or have any connection with a written will, (see *Taylor* vs *D'Egville*, 3 Hagg., p. 202; *Bragge* vs *Dyer*, *Id.*, p. 207; *The King's Proctor* vs *Davies*, *Id.*, p. 218; 1 Redfield, *on Wills*, pp. 198 and 199), nor to the will in question here intended by the deceased to be a written will. It is proved that Malo did not intend to make a merely verbal will; on the contrary, his intention was and he actually set about making a deliberative written will in notarial form. He had no apprehension of want of sufficient time to make and complete a written will; on the contrary, he directed the notary to write out his will, in the full belief that the officer would have time to perfect it in notarial form. The witnesses, the Blanchards, did not attend to hear his merely verbal declaration as his will; on the contrary, they were present as the official witnesses of the law, to supply the place of the second notary, to oversee the correct performance of the instrumenting notary's duty in writing down the declared dispositions dictated to him. Malo had so little thought of being stayed in having his written will completed and executed by the notary, that, having briefly stated his intentions to the notary, to be extended formally and in writing by that officer, during the interval of the notary's writing the will, the deceased conversed with Elzear Blanchard, one of the witnesses, upon matters entirely and altogether unconnected with the will and its dispositions. Malo plainly had no wish and, certainly, had no probable immediate necessity to declare his will by words

only. None present, including himself, believed him to be so near death, and Vilbon Blanchard says: "*Nous n'avions aucune idée qu'il était sur le point de mourir.*" None of the constituents of the definition of a nuncupative will are to be found in the circumstances above referred to, and, although the act of God did prevent the deceased from completing his written notarial will in French form, that preventive act did not, in fact, nor could it, by law, be construed to convert an incomplete written French will into an English nuncupative will. In this respect, the constructions given by the English probate Courts to such circumstances do not avail here as jurisprudence. In England, the policy of the law favoured wills, whilst in this Province the law favours successions and not wills. By the Quebec Act, power was given to make testaments executed in the forms prescribed by the law of England, namely, wills written or nuncupative and simply verbal, the one or the other, in their precise and actual form, but not a constructive hybrid from both forms, the effect of the construction of the English Ecclesiastical Courts of probate, and by them judicially declared to be nuncupative, but in fact being in neither one form nor the other. The forms of the executed testament referred to in the Quebec Act are of course known and acknowledged by our law when they offer themselves before our tribunals, which, however, are not bound to recognize nor do they recognize as the law of the Province or as authority the decisions of the English probate Courts, which do not regulate or govern such a case as this. Hence it seems that Malo's declaration were not technically a nuncupative will or in nuncupative form as a testament executed according to the form prescribed by the law of England. Moreover, the Statute of Frauds of 1676, 29 Charles 2, ch. 3, has provided restrictions upon nuncupative wills. The 19th Section of the Statute enacts that: "No nuncupative will shall be good, when the estate thereby bequeathed shall exceed the value of £30, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; nor unless it be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, &c." The law writers hold that the requirements of the Statute shall receive very strict enforcement by the courts, and these have in fact given a rigid and strict construction with regard to those requirements. The reasons given by our French Jurists are not inapplicable to this practice. "Lorsque la volonté du testateur est destituée de quelques formalités que la loi exige pour la rendre efficace, le pouvoir accordé par la loi lui impose la nécessité d'observer certaines formalités qui sont autant

de conditions qu'il doit remplir afin qu'il puisse mettre en usage ce pouvoir. La volonté seule du testateur ne peut prévaloir sur la puissance de la loi." Under the law as administered in England all the requirements of the existing law must appear to have been fully and precisely complied with; amongst these are the presence of three witnesses at the time of the verbal declaration of the testator as his will, and their having according to the Statute been bid by the testator to be present, technically known as the *rogatio testium*, that is, their being called upon or bid by the testator to be witnesses to bear testimony to his words as his last will and testament. Both of these requirements are strictly essential, and have been strictly enforced in England. See *Burnett* vs *Jackson*, 2 Phil., p. 191; *Parsons* vs *Miller*, Id., p. 125. *Testes rogati esse debent ut testamentum fiat* is the precise rule of the Roman law imported into the enactment of the Statute, 1 Roberts, *On Wills*, p. 200. This last statutory requirement is altogether wanting in this case. The instrumenting notary was not bid as a statutory witness of the verbal declarations of the intending testator; on the contrary, he says, that he attended in his official capacity to make the notarial will, or as our French law writers express it, *n'y faisant que la fonction d'officier public, pour donner à son acte la forme authentique, et n'était pas considéré comme témoin*. The Blanchards attended at the request of the notary as his official witnesses in the absence of the second notary, to oversee like him, as required by law, the correct making of the will by the instrumenting notary; they were not bid by Malo at all, nor were they called upon by him as witnesses to notice his words to constitute his will without writing, and indeed one of them says in his testimony: "*Il ne nous a fait aucune question sur le but de notre visite.*" There is clearly no *rogatio testium* by Malo to his alleged verbal declaration as his will, before his declaration or when he was stating his last wishes to the notary to be written down by that officer, and which Malo did not afterwards repeat. The statutory number of witnesses and their statutory qualifications are required not less for the formal execution of the will, than for the proof of it, because the law exacts, without distinction, the number of witnesses and their being bidden at the time of speaking, both for formality and proof. No good nuncupative will can exist unless the statutory ceremonies are complete; without them, the act is incomplete and inchoate. The want of the *rogatio testium* for a nuncupative will, where the bequest claimed exceeds £30, as it does in this cause, renders such will not good in the words of the Statute, and is therefore not a will in the form prescribed by the law of England

as referred to in the Quebec Act. It must be observed that there is no probate of this alleged verbal and nuncupative will; without probate, the declarations of Malo are merely verbal allegations on the record, words without writing or intended writing which cannot be taken as a nuncupative will. To give them the effect of a nuncupative will, they are required to be precisely probated as having been verbally declared as such will, without purpose of revision, and without that probate in support, plaintiff's action must fail upon the averment of a nuncupative will, and this is so settled by the law: *La volonté noncupative des personnes qui testent sans écriture ne pourrait valoir que quand il y en aurait une preuve légale;* without that legal proof, *le testament devenait inutile.* The probate produced in this cause is not the probate of a verbal or nuncupative will, which is not supported by the probated writings A and B. Upon this subject of probate, it will be borne in mind that the law of the testator's domicile is the rule for probate, and therefore probate as a matter of proof is subject to the rules of our Provincial law. The 19th section of the Statute of Frauds of 1676, 29 Charles 2, ch. 3, which enacts the mode of proof of nuncupative wills, forms no part of our municipal law in that respect, either by positive legislation or by implication from the terms of the Quebec Act. The latter gives the privilege of using the forms prescribed by the law of England, for the execution of a will, but has not introduced the statutory mode of proof for nuncupative wills. It is scarcely necessary to say that, apart from the mere proof of what occurred at the time of the will, the English probate jurisprudence holds that, as the will could have no operation except through the testimony of the witnesses bid to be present, the testimony must extend beyond the mere fact of execution and must include the opinion of the witnesses, that the testator was at the time of sound and disposing mind and memory and free from the influence of any extraneous compulsion or constraint, and this testamentary capacity is required to appear by the clearest and most indisputable testimony. None of this has been evidenced by the probate produced or by the evidence of record. Some provisions of the Statute of frauds relating to commercial matters and the proof of them, have by express legislation, been brought into our legal system, but the mode of proof for nuncupative wills under the 19th section is not law in this Province. The law of Malo's domicile expressly prohibits the verification and proof of such wills by witnesses, as it prohibits the proof of all things in excess of a very limited fixed amount, much less than this bequest, without evidence in writing first produced. The Ordinances of Moulins

and of 1667 are precise in their terms and general application *pour toutes choses*, &c. See Danty, *de la preuve*, by Boiceau. These provisions are too well known to need being cited at length. Under all these circumstances, the alleged nuncupative will in question is a nullity and without legal effect, besides being unproved as required by law; and hence the legal conclusion necessarily follows, *le legs d'un testament nul n'est dû* (2 Desp., p. 263, n° 8) and the plaintiff's action upon that ground is without support. But plaintiff, by her factum, insists upon the contradition, that the will in question is not only nuncupative, but written also, made according to the law of England for personalty. For this alleged written will, she uses the probated paper writings above mentioned as sufficient, and supports their relevancy by reference to the authorities cited in the case of *Flanagan* and *Colville*, decided by this Court and reported in 8 L. C. Jurist, pp. 223 and seq.; 14 *D. T. B. C.*, p. 328; 13 *R. J. R. Q.*, p. 56, et *suprà*, p. 50. It has been already observed. that mere probate in this Province is not conclusive of the validity of a will, or of its testamentary dispositions, and it may be added that the case cited offers no one particular of similarity with this case, except the fact that the claim in both is for personalty, with regard to which the English probate Courts are not scrupulous. A mere memorandum or scrap of paper written by a person in contemplation of death and with a design to make it effective after the event, was admitted to probate by those courts as testamentary dispositions; no ceremonies in the publication and no subscription of witnesses in attestation were required. Death was the event which gave life and operation to the intended instrument. So, the mere instrctions to one's solicitor giving specific directions to prepare a will of personalty, were also admitted to probate, 2 Moore's P. C. Cases, p. 83, but this was done upon the ground, that final instructions for a will were held by judicial construction of those courts to be of the same validity as the will itself, when the final consummation of the act was hindered by the death of the testator, the decision resting only upon the credibility of the verbal evidence, and established by judicial construction. Here again those decisions are of no binding authority here; they cannot substitute construction for the absolute forms of the enactment in the Quebec Act, nor could such verbal instructions be proved by oral evidence, under the law of the Province, to constitute a written will in the English form. The Provincial law, which prohibits oral evidence in such matters, cannot recognize the probated paper writings A and B, as the written will of Malo by whom they had neither been approved nor seen, and whose disposi-

tions might have received revision before his signature for their completion could have been required. Even in England where no particular formalities in this disposal of personalty are required, presumption is always against an imperfect paper operating as testamentary, 1 Williams, *Executors*, pp. 91, 92. In this Province the law regards the form of the will to determine upon its required formalities and validity, and where the form is not satisfactory, its invalidity necessarily follows. Under all the circumstances of plaintiff's case, as presented to this court by her counsel, and as shewn by the record, she has failed to establish a legal cause of action, and the appeal against the judgment in her favour must be maintained.

DUVAL, C. J., CARON, J., and DRUMMOND, J., concurred in the notes of Judge BADGLEY.

The judgment in appeal was as follows : " La Cour, considérant qu'aux termes du droit civil, celui qui fait un testament nul ou incomplet meurt intestat aussi bien que celui qui n'en fait aucun ; considérant que, tant que le testament authentique n'a pas été revêtu de la signature du testateur, et que les formes légales voulues pour lui donner validité n'ont pas été observées, la dictée qui en a été commencée, aussi bien que la rédaction qui en a été faite, ne sont d'aucune valeur, tellement que le testateur qui meurt pendant telle dictée et rédaction, et avant d'avoir complété et signé son testament, meurt intestat, et que les dispositions ainsi dictées et recueillies par le notaire sont, à tous égards, non avenues et doivent être considérées comme si elles n'avaient jamais été écrites ; et que la rédaction faite par le notaire n'est pas même un écrit qui puisse soustraire la preuve qu'on voudrait faire de ces dispositions aux prohibitions de la loi qui repoussent le testament verbal et proscrivent la preuve testimoniale des dispositions de dernière volonté ; considérant que, dans la présente espèce, feu Prudent Malo, le père de l'appelante, est mort avant d'avoir complété et signé son testament, et que le tribunal ne peut avoir d'égard aux dispositions qu'il avait dictées et qui avaient été rédigées par le notaire, et notamment ne peut reconnaître le legs fait en faveur de l'intimée, et lui donner effet, tel legs étant censé non écrit et non avenu, et que le projet de testament produit n'est pas un écrit ainsi que ci-haut mentionné, et que cet écrit n'a pas changé la nature de la preuve que l'intimée a tenté de faire de ce legs, laquelle est une preuve testimoniale répudiée par le droit ; considérant, de plus, qu'admettre la prétention soutenue par l'intimée que le testament en question peut valoir comme testament noncupatif serait renverser les principes reçus sur la matière et sanctionner les dispositions verbales de dernière volonté, et

que supposant que le testament en question pût valoir comme testament noncupatif, un testament noncupatif interrompu surtout par la mort du testateur ne peut valoir; considérant, enfin, que quelles que soient les considérations équitables qui militent en faveur de l'intimée, ces considérations ne peuvent faire fléchir les dispositions rigoureuses du droit qui, en matière de testament, sont d'ordre public, et qu'il y a erreur et mal jugé dans les jugements qui ont maintenu la validité dudit testament, savoir le jugement rendu par la Cour Supérieure siégeant à Montréal, le 31 de mai 1867, et le jugement rendu par ladite Cour de Revision, à Montréal, le 28 de mars 1868, a infirmé et infirme et casse lesdits deux jugements, et, faisant ce que les premiers juges auraient dû faire, a débouté et déboute l'intimée de son action, etc."

The appeal was from this judgment of reversal of the Superior Court.

Mr. H. M. BOMPAS, for the appellant: There are two questions: first, whether the validity of the will of a domiciled Canadian, made in 1865 (before the promulgation of the Civil Code of Lower Canada), is to be determined by the English law introduced by the Imperial Statute, 14th Geo. 3, c. 83, s. 10, or by the general French law in force in Lower Canada? and secondly, whether probate granted by the Superior Court to such a will is not conclusive, so as to prevent such will being impugned by the heir of the deceased as not valid by the law of Lower Canada? (Sir James COLVILE: As the respondents raise an objection to the power of the Assistant Judge of the Superior Court to grant probate, and the consequent validity of the probate itself, their Lordships wish that point to be argued first). By the law of England as well as France the grant of probate is conclusive evidence of the testamentary character of the instrument. A will admitted to probate can only be impeached on appeal from the Court of Probate, or set aside by a suit for the revocation of the probate: 1 Jarman, on *Wills*, p. 22 (3rd ed.); *Allen* vs *McPherson*, 1 House of Lords Cases, p. 191; *Caldwell* and *Attorney General* (1). The probate, therefore, is conclusive evidence

(1) Les diverses formes de testament établies en Canada par le statut impérial de 1774, 14 George 3, ch. 83, ont été celles qui, en Angleterre, sont reconnues avoir pour effet d'opérer une translation et une disposition suffisantes des biens du testateur. Ces formes ont été introduites en cette colonie pour l'avantage de ceux des sujets du roi qui, s'y étant établis, ignoraient les formes prescrites par les lois françaises, et dans le but de leur rendre plus aisée la disposition de leurs biens et de les autoriser à les léguer par testament en Canada aussi facilement et d'une manière aussi efficace qu'ils l'eussent fait en Angleterre. On ne peut certainement pas inférer de ce statut que la forme de testament capable seulement d'opérer un legs de meubles ait un effet plus étendu en Canada qu'en Angleterre, ou qu'elle puisse opérer un legs d'immeubles en Canada, lorsque par les lois du pays elle est jugée insuffisante pour

that the writings admitted to probate constitute valid testamentary dispositions. By the old French common law of the Province of Lower Canada only two forms of solemn wills were valid—the authentic or notarial and the olographic. The first was executed before public officers, namely two notaries, or one notary and two witnesses. The testamentary dispositions were to be dictated by the testator to the instrumenting notary, who was to read the will to the testator for his approval and to be then signed by the testator and the two notaries, or by one notary and two witnesses, as the case might

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cet objet. Les termes de la sec. 10 de ce statut, laquelle se lit ainsi qu'il suit "Il sera et pourra être loisible à toute et chaque personne, propriétaire de tous immeubles, meubles ou intérêts, dans ladite province, qui aura le droit d'aliéner lesdits immeubles, meubles ou intérêts, pendant sa vie, par vente, donation, ou autrement, de les tester et léguer à sa mort par testament et acte de dernière volonté, nonobstant toutes lois, usages et coutumes à ce contraires, qui ont prévalu, ou qui prévalent présentement en ladite province ; soit que tel testament soit dressé suivant les lois du Canada, ou suivant les formes prescrites par les lois d'Angleterre," sont clairs et formels. Le sens évident de ces termes est que toute personne désireuse de disposer de ses immeubles, en Canada, par un testament suivant la forme anglaise, doit suivre toutes les formalités que requiert cette forme pour qu'un tel testament opère un legs d'immeubles en Angleterre ; la même chose doit se faire pour les biens meubles. Ce statut ne signifie pas que les formes reconnues par les lois des deux pays puissent s'amalgamer de telle sorte qu'une personne adopte en partie la forme de testament reconnue par les lois de l'un pour donner effet à une forme insuffisante sous l'empire des lois de l'autre, car ce serait adopter une forme non reconnue par les lois des deux. La distinction est suffisamment marquée, on doit suivre en entier les formalités requises par les formes de l'un ou de l'autre pays, et la forme adoptée doit être efficace suivant la loi du pays où on l'a prise ; les formes de l'un des deux pays sont introduites dans l'autre, et les formes en vigueur dans celui-ci sont confirmées de manière à former deux modes distincts de translation des biens immeubles par testament. (*Caldwell* et *Procureur Général*, Cour d'Appel, Québec, 30 juillet 1828, confirmant le jugement de la C. B. R., Québec, Stuart's Rep., p. 327, et 1 R. J. R. Q., p 284)

"Qu'il soit écrit et signé par le testateur," telles sont les deux conditions indispensables que requiert, au point de vue de la forme, pour la validité du testament olographe, l'art. 289 de la Coutume de Paris, dont l'une des dispositions se lit ainsi qu'il suit : "Pour réputer un testament solennel, est requis qu'il soit écrit et signé du testateur." La signature du testateur doit être apposée à la fin de l'acte ; si l'écrit ne porte pas de signature finale, il y a tout lieu de présumer qu'il n'est que le simple projet d'un testament. (*Caldwell* et *Procureur Général*, Cour d'Appel, Québec, 30 juillet 1828, confirmant le jugement de la C. B. R., Québec, Stuart's Rep., p. 327, et 1 R. J. R. Q., p. 284)

La sec. 10 du ch. 83 des Statuts Impériaux de 1774, 14 Geo. III, intitulé : "Acte qui règle plus solidement le gouvernement de la province de Québec, en l'Amérique Septentrionale," se lisait ainsi qu'il suit . "Il sera et pourra être loisible à toute et chaque personne, propriétaire de tous immeubles, meubles ou intérêts, dans ladite province, qui aura le droit d'aliéner lesdits immeubles, meubles ou intérêts, pendant sa vie, par vente, donation, ou autrement, de les tester et léguer à sa mort par testament et acte de dernière volonté, nonobstant toutes lois, usages et coutumes à ce contraires, qui ont prévalu, ou qui prévalent présentement en ladite province ; soit que tel testament soit dressé suivant les lois du Canada, ou suivant les formes prescrites par les lois d'Angleterre." D'après l'interprétation à donner aux dispositions contenues en cette section, un testament disposant de biens meubles ou immeubles en Canada est valide s'il a été exécuté conformément aux lois en vigueur en ce pays, lesquelles exigent la même forme pour un testament disposant de biens immeu-

be, when it became an authentic *minute*, or notarial *acte*, having full authenticity in itself, without other proof of its execution: 3 Henry's Works, lib. 5, quest. 8; Bretonnier Cod., sect. 4, dis. 1, n° 4. The olographic form of will must be entirely written and signed by the testator: 2 Despeisses, p. 86, n° 111; Lacombe, *Rec. de Jurisp.*, v° *Testament*, p. 323. The notarial or authentic form of will is recognized in art. 843 *et seq.* of the Civil Code of Lower Canada. By the Imperial Statute called the

bles que pour un testament disposant de biens meubles ; et un testament disposant de biens meubles en Canada, est valable si, suivant les lois anglaises, il est suffisant pour disposer de biens meubles ; mais un testament disposant de biens immeubles en Canada, s'il n'a été exécuté conformément à la loi en vigueur en ce pays, est invalide, à moins qu'il n'ait été dressé suivant la loi anglaise. La section ci-dessus contient les mots suivants : " Dressé suivant les lois du Canada, ou suivant les formes prescrites par les lois d'Angleterre." La loi anglaise ne prescrit aucune forme pour le testament disposant de biens meubles ; mais, pour qu'un testament disposant de biens immeubles soit valide, elle exige qu'il soit exécuté suivant des formes déterminées. C'est à ces formes que renvoie le Statut lorsqu'il parle d'un testament disposant d'immeubles, *dressé suivant les formes prescrites par les lois d'Angleterre*, et le terme *dressé* comprend la confection, la souscription et l'attestation de la manière indiquée par le Statut des Fraudes de 1676, 29 Charles II, ch. 3. L'Acte provincial de 1801, 41 George 3, ch. 4, intitulé : " Acte pour expliquer et amender la loi concernant les testaments et ordonnances de dernière volonté," et qui décrétait, sec. 1, que : " Il est et sera loisible à toutes personne ou personnes saines d'entendement et d'âge, usant de leurs droits, de léguer et disposer, par testament ou actes de dernière volonté, soit entre conjoints par mariage en faveur de l'un ou de l'autre desdits conjoints, soit en faveur de l'un ou plusieurs de leurs enfants à leur choix, ou en faveur de qui que ce soit, de tous et chacuns leurs biens, meubles ou immeubles, quelle que soit la tenure desdits immeubles, et soit qu'ils soient propres, acquêts ou conquêts, sans aucune réserve, restriction et limitation, nonobstant toutes lois, coutumes et usages à ce contraires. Pourvu, néanmoins, que le testateur ou la testatrice, étant conjoint ou conjointe par mariage, ne pourra tester que de sa part des biens de sa communauté ou des biens qui lui appartiendront autrement, ni préjudicier par son testament aux droits du ou de la survivante, ou au douaire coutumier ou préfix des enfants. Pourvu aussi, que le droit de tester, tel que dessus spécifié et déclaré, ne pourra être considéré s'étendre à donner pouvoir de léguer et donner par testament ou ordonnance de dernière volonté, en faveur d'aucune corporation ou autres gens de mainmorte, excepté dans le cas où telle corporation ou gens de mainmorte auront la liberté d'accepter et recevoir suivant la loi," n'a pas eu pour objet de modifier et n'a pas modifié la loi concernant la forme des testaments en Canada. Ce statut, en se servant dans sa section première des mots "*léguer et disposer*" et "*quelle que soit la tenure desdits immeubles*," et en faisant mention des legs par testaments aux gens de mainmorte, démontre que la Législature Canadienne a reconnu que le Statut impérial de 1774, 14 George 3, ch. 83, avait trait aux legs d'immeubles, ainsi techniquement appelés dans les lois d'Angleterre." Il suit de là qu'un testament disposant d'immeubles, écrit en entier de la main du testateur, ce dernier ayant inclus son nom dans le testament sans cependant apposer sa signature à la fin des dispositions qu'il contenait, quoique olographe, n'a pas été exécuté en conformité de l'ancien droit français qui est la loi du Canada et qui exige que le testateur appose sa signature à la fin de son testament, et est manifestement nul comme legs d'immeubles fait suivant les formes prescrites par les lois anglaises. (*Meiklejohn*, tuteur, etc., et *Procureur Général du Bas-Canada et al.*, Conseil Privé, 21 juin 1834, confirmant le jugement de la Cour d'Appel, Québec, 30 juillet 1828, qui avait confirmé le jugement de C. B. R., Québec, Stuart's Rep., pp. 327 et 581 ; 2 Knapp's Rep., p. 328, et 1 R. J. R. Q., pp. 284 et 291)

Quebec Act of 1774 (14th Geo. 3, c. 83, s. 10), it was provided that every owner of lands, goods, &c., in the province, who had a right to alienate them in his lifetime, might devise or bequeath them by last will or testament, such will being executed either according to the laws of Canada or according to the forms prescribed by the law of England. This statute introduced into Lower Canada the law of wills then in force in England, and included imperfect testamentary papers, relating to personalty and nuncupative wills. It appears that from this period, at least, if not previously, the mode of obtaining probate of wills in Lower Canada executed in the English form was similar to the practice now in use, and according to which the will in question was proved, for in 1801, the Provincial Act (41st Geo. 3, c. 4), was passed, which recited that doubts having arisen regarding the method to be followed of proving last wills and testaments, made and executed according to the forms prescribed by the law of England, before one or more of the judges of the courts of civil jurisdiction in the province, in order to remove these doubts, it was, by sect. 2 of that act, declared that the civil judge should be authorized to grant probate of such wills, as by a court of probate; and it is stated by Mr. Justice BADGLEY, in his judgment in this case, that since that time probates have been granted by the judges of the civil court as before, in conformity with the common law of the Province, and according to the recognized and admitted legal maxim "that the law of the testator's domicile is the rule for probate." A single judge has full power: Con. Stat. Lower Canada of 1861, ch. 78, sec. 23. The will, therefore, being valid, whether made in the English or French form, and having been made before the promulgation of the Civil Code, which has abolished nuncupative wills for the future, it was sufficient to establish that the will possessed all the conditions necessary to entitle it to probate. That was our contention in the court below; and as regards the *factum* of the will the probate thus obtained is conclusive. By the French law, even if the grant of probate is to be treated only as an authentication of the will, it is conclusive until set aside by a competent authority: Civil Code of Lower Canada, arts 1210, 1222; Pothier, *Traité des Obligations*, tome 1, pp. 474 and 482.

Mr. HEMMING, for the respondents: The papers admitted to registration as the will of Prudent Malo were, on the face of them, not his will. The order of the assistant judge, of the 27th of December, 1865, directing such registration on the registry of probate, and all proceedings taken under that order, were inoperative upon any question relating to the validity of such alleged will. It was not a will executed

according to the English law relating to wills introduced into Lower Canada by the 14th Geo. 3, c. 83, s. 10, and according to the *lex fori* it was not entitled to probate as a nuncupative will, such form of will being unknown to and inadmissible by the law of Lower Canada, or as an imperfect testamentary paper: Civil Code of Lower Canada, art. 1233, sect. 7. As in contracts, the law of the country where the contract is to be enforced governs the admissibility of evidence: *Bain* vs *The Whitehaven and Furness Junction Railway Co.* (1); *Yates* vs *Thomson* (2); and not, as insisted here, the practice of the English Court of Probate and the rules regarding testamentary papers, which are only, at the highest, inferentially introduced by the Statute 14th Geo. 3, c. 83, s. 10. By the law and practice of Lower Canada, the registration of the will was not conclusive, and did not preclude the court there from holding in the action by the appellant that the deceased did not make such a will as alleged, or any will, and it was not requisite before disputing such will that the registration of it should be annulled. The Lower Canada Act, 41st Geo. 3, c. 4, sect. 2, giving power to the court to grant probate of "Wills and Testaments" according to the laws of England, made persuant to, and by authority of, the Imperial Statute, 14th Geo. 3, c. 83, sect. 10, clearly never contemplated or intended to include such testamentary papers as were then admitted to proof by the Courts of Probate in England, and, among them, nuncupative wills.

Their Lordships directed Counsel to proceed on the question of the validity of the testamentary paper as a will.

Mr. H. M. Pompas: It will be necessary to consider this question both by the French law prevailing in Lower Canada and by the English law introduced by Imperial or Provincial Statutes. As regards the law of wills, the french law, as it existed previously to the Code Napoléon, according to the Custom of Paris, was the law received and acted on in Lower Canada previous to the introduction of the English law of wills by the 14th Geo. 3, c. 83, sect. 10, and the proof of such wills by the Provincial Statute 41st Geo. 3, c. 4. Mr. Justice BADGLEY, in his judgment in the court below, enumerates only two kinds of wills made in solemn form, the one before two notaries or a notary and two witnesses, and the other by a holograph writing, which required no witnesses. In neither case could the testator dispose of more than a part of his property. On his death the whole property real and personal vested in the heir

(1) 3 House of Lords Cases, p. 1.

(2) 3 Clark and Finnelly's Rep., p. 544.

named in the will, the executors having power to deal with the property only as representing the heir. This law was altered by the Imperial Statute 14th Geo. 3, c. 83, s. 10, which provided that every owner of lands, goods, &c., in the Province, who had a right to alienate them in his lifetime, might devise or bequeath them by last will and testament, such last will being executed either according to the law of Canada or according to the forms prescribed by the law of England. The forms of wills which existed in England, and the rules as to the admissibility of testamentary papers and evidence received in the Ecclesiastical Courts were thus introduced into Lower Canada. In *Meiklejohn* vs *The Attorney General of Lower Canada* (1), this tribunal held that, under that statute, a will which was invalid by the French law, and not executed according to the English Statute of Frauds, so as to pass lands, passed copyholds and leaseholds, and was valid, therefore, as a disposition of personal estate, and that, although a deceased person intended to make a will, in solemn form, according to the French law, and the instrument being imperfect and incomplete, was void by that law, yet it might nevertheless be valid by the English law; *Masterman* vs *Maberly* (2); *Lambert* vs *Gauvreau* (3). Art. 855 of the Civil Code of Lower Canada is declaratory of the law of Lower Canada, and the following art. 857, regarding the probate and proof of wills, is evidence of what the law was in that respect previous to the promulgation of the Civil Code. The paper writing produced by the witness, Blanchard, was, by the English law, a valid nuncupative will committed to writing by withnesses: *Freeman* vs *Freeman* (4); *Lemann* vs *Bonsall* (5); *Bennett* vs *Jackson* (6): and the imperfect testamentary paper produced by Brillon, the notary, so far as it relates to the bequest of an annuity to the appellant, being complete, was a good written will as respected personal property, and one our Courts of Probate would before the passing of the Wills' Act 1st Vict., c. 26, have granted probate of: *Nathan* vs *Morse* (7); *Forbes* vs *Gordon*(8); *Montefiore* vs *Montefiore* (9); *Deveraux* vs *Bullock* (10); *Brown* vs *Hallett* (11); *Allen* vs *Manning* (12).

(1) *Suprà*, p. 64.

(2) 2 Hagg. Ecc. Rep., p. 235.

(3) *Suprà*, p. 51.

(4) 1 Lee's Ecc. Rep., p. 343.

(5) 1 Add., p. 389.

(6) 2 Phil., p. 190.

(7) 3 Phil., p. 531.

(8) Ibid., p. 614.

(9) 2 Add., p. 354.

(10) 1 Phil., p. 72.

(11) 2 Lee's Ecc. Rep., p. 418.

(12) 2 Add., p. 490.

Castle vs *Torre* (1). Effect would be given to such imperfect testamentary paper by Courts of Law and Equity: *Lemayne* vs *Stanley* (2); *Ellis* vs *Smith* (3); and entitle the appellant to receive the annuity out of the testators personal estate.

Mr. HEMMING, for the respondents: The formularies required by the French law, as stated on the other side, are conclusive that Prudent Malo never made a will. The papers were improperly admitted to probate as his will. The Imperial Statute 14th Geo. 3, c. 83, s. 10, which enacts that wills and testaments executed according to the forms prescribed by the laws of England are entitled to probate, was intended to apply only to properly executed wills, and not to embrace nuncupative wills or imperfect testamentary papers. None of the cases cited on the other side regarding imperfect testamentary papers apply. In *Munro* vs *Coutts* (4), the House of Lords held that an unfinished paper was not a testament or will. So in Lower Canada, *Colville* vs *Flanagan* (5). The agreement as to evidence and the proceedings in the action, the question on the merits as to the validity of the will, and as to the sufficiency and admissibility of the evidence adduced by the appellant in support of it, were intended to be and were, in effect, submitted to the court below free from the technical question, whether the registration ought not also to be annulled. A grant of probate might be recalled on the ground of fraud.

Their Lordships reserved judgment, which was now pronounced by Sir Robert PHILLIMORE:

This is an appeal from a judgment of the Court of Queen's Bench for the Province of Quebec, which reversed the judgment of the Superior Court for Lower Canada, sitting in the district of Montreal. The litigation relates to the execution of a will, and the following short statement of facts is necessary: Prudent Malo, a merchant of Belœil, died on the 25th of April, 1865, leaving an only daughter and a property, in moveables and immoveables, of the value of about £8,000. On the morning of that day, Malo was dangerously ill and, being apprised of his danger by his medical attendant, desired him to fetch a notary named Brillon, for the purpose of making his will. Brillon came and had an interview with the deceased who said he wished to make his will, and it was arranged that

(1) 2 Moore's P. C. Rep., p. 133.

(2) 3 Lev., p. 1.

(3) 1 Ves., p. 11.

(4) 1 Dow, p. 437.

(5) *Suprà*, p. 50.

two witnesses of the name of Blanchard should attest it; the deceased said that he wished to bequeath an annuity of £25 to the *demoiselle* Migneault, giving reasons for the wish that he desired his debts to be paid; £25 to be given to the poor of his parish, the residue of all his property to his daughter, madame Brousseau, for her life, and afterwards, to her children born or to be born of her present or any other marriage, and he named three executors. The deceased seems to have made a similar statement of his intentions to his medical attendant. The notary and the witnesses arrived about 12 o'clock; in their presence, the deceased said: "*Je veux faire faire mon testament.*" He then said as follows: "Je recommande mon âme à Dieu. Je veux que toutes mes dettes soient payées et les torts par moi faits réparés. Je veux que mes funérailles soient faites avec le moins de pompe possible, en laissant cependant cela à la discrétion de mes exécuteurs testamentaires. Je donne aux pauvres de la paroisse de Belœil $100, à leur être payés $25 par an. Je veux qu'il soit payé à Dlle Migneault £25 par an, pourvu qu'elle ne se marie pas. Je donne et lègue à ma fille, épouse de Jean-Bte Brousseau, en jouissance, tous mes biens tant qu'elle vivra et la propriété, je la donne aux enfants nés et à naître du mariage avec M. Brousseau, ou de tout autre mariage contracté par la suite. Je nomme pour mes exécuteurs testamentaires mes amis le Dr Allard, le docteur Rottot, et mon gendre Brousseau. Il dit alors que c'était toutes ses dispositions. Je veux aussi que la majorité de l'opinion de mes exécuteurs testamentaires prévale dans le règlement de mes affaires." The notary asked the witnesses if they clearly understood what Malo had stated; he then proceeded to write and having made what may be called a religious preface, proceeded as follows: "Deuxièmement: Veut et ordonne ledit sieur testateur que toutes ses dettes soient payées et torts par lui faits réparés, si aucuns se trouvent, par ses exécuteurs testamentaires ci-après nommés. Troisièmement: Veut et ordonne ledit sieur testateur que ses obsèques aient lieu de la manière la plus modeste possible, laissant tout à la volonté et discrétion de ses exécuteurs testamentaires ci-après nommés. Quatrièmement: Veut et entend ledit testateur qu'il soit payé à Dlle Louise Migneault, annuellement, sa vie durante, pourvu qu'elle ne change pas de nom, une somme de $100. Cinquièmement: Donne et lègue ledit testateur aux pauvres de la paroisse de Belœil une somme de $100, à leur être payée par paiement de $25 par an. Sixièmement: Quant à tous les autres biens, tant meubles qu'immeubles, argent, or, dettes et obligations, meubles de ménage, et autres biens généralement quelconques que le testateur délaissera et qui lui appartien-

dront à son décès, sans en excepter." When he had finished this last word, the testator died, before therefore the bequest to his daughter and the appointment of the executors was written and before he had signed the paper. It appeared that the two witnesses afterwards retired to another room and wrote as follows: " Nous, soussignés, ayant été requis par feu Prudent Malo, comme témoins de son testament, nous étant rendus auprès de lui, avec M. Brillon, notaire, il s'exprima ainsi; se tournant vers M. Brillon, il lui dit: Vous allez écrire mon testament. D'abord que mes dettes soient payées, qu'une pension de $100 par année soit payée à Dlle Migneault, tant qu'elle ne changera pas de nom. Je donne aux pauvres de la paroisse de Belœil une somme de $100, payable $25 par année. Que mes services funéraires soient faits avec modération, à la discrétion de mes exécuteurs testamentaires. Tous mes autres biens en jouissance à ma fille, et en propriété à ses enfants nés et à naître de son présent mariage, ou de tous les autres mariages qu'elle pourra contracter. Je nomme mon ami J. B. Allard, mon ami le Dr Rottot, et mon gendre Brousseau, mes exécuteurs testamentaires, qu'une majorité des trois prévale dans leurs délibérations." Belœil, 25 avril 1865. (Signé): ELZÉAR BLANCHARD. V. BLANCHARD." On the 20th of July, 1865, the appellant, Migneault, presented a petition to a judge of the Superior Court, praying for probate of the will, as contained in the two paper writings to which I have referred. Madame Brousseau and her husband, the respondents, were cited to appear and did appear. The appellant examined the witnesses, whom I have mentioned, in support of the will, and they were cross-examined on the part of respondents, who also put in an answer, or, as it was termed, *défense au fond en droit.* They did not, however, produce any witnesses, though special time was allowed to them for so doing, but addressed an argument to the court, by their counsel, against the validity of the will, and, on the 27th of December, 1865, the court, consisting of a single judge, M. Justice MONK, gave sentence in favour of appellant, and directed probate to be granted of the two papers, as together containing the will of the deceased, and condemned defendants in the costs. In the month of September, 1866, appellant brought her action, in the Superior Court, for the annuity, and for the costs awarded to her in the probate court; the action was formally contested by respondents, and it was arranged that the evidence (subject to all exceptions) taken before the court of probate should be used. Mr. Justice BERTHELOT heard the cause and decided in favour of appellant, apparently on the double ground that the sentence of the probate court was valid: " Vu que ladite sentence du 27 décembre 1865 est dans toute sa force et vertu, et doit

avoir tout l'effet que lui donne la loi." And that the appellant was entitled to succeed upon the merits. The case was next heard before the Court of Revision, composed of three judges, two of whom were judges MONK and BERTHELOT, who maintained their opinion, the other judge dissented; there was an appeal to the Court of Queen's Bench, consisting of five judges, who unanimously reversed the sentence of the inferior courts. From this decision, the present appeal has been instituted. No controversy is raised as to the facts in this case. It is clear that the deceased was of perfectly sound mind, that he intended to make his will in solemn form, before a notary and two witnesses, and to dispose of his property in the manner described in the papers of which probate has been granted. The contention is as to the law applicable to these facts. The contention is two-fold. The first is that the probate granted is not conclusive as a judgment *in rem* or a judgment *inter partes*. There is no doubt that a probate in England, granted in solemn form, after due citation of parties, would have this effect. And it is certainly much to be lamented if a rule of law and practice so obviously conducive to the interests of justice and the quieting of litigation does not prevail in Lower Canada. Their lordships, therefore, desired this part of the case to be argued separately. The result is as follows: Previously to the year 1774 and the passing of the Imperial statute 14 Geo. III, ch. 83, wills according to the common law of Canada, could be made only in three ways. 1° Before two notaries. 2° Before a notary and two witnesses. 3° By a holograph writing which did not require witnesses. The statute (or Quebec Act, as it is usually called) 14 Geo. III, ch. 83, however, introduced another form of will enacting (sec 10): "That it shall and may be lawful to and for every person that is owner of any lands, goods, or credits, in the said province, and that has a right to alienate the said lands, goods, or credits, in his or her lifetime, by deed of sale, gift or otherwise, to devise or bequeath the same at his or her death, by his or her last will or testament; any law, usage, or custom, heretofore or now prevailing in the province, to the countrary hereof in any wise notwithstanding, such will being executed either according to the laws of Canada, or acccording to the forms prescribed by the laws of England." There appears never to have been and not to exist, at present, any court which exercises a special jurisdiction with respect to wills. A practice dictated by obvious convenience or necessity seems to have grown up in Canada, after the conquest of that country by England, of registering, or, as it was somewhat loosely termed, proving wills made according to English law before a judge of the civil court. This practice, the legal effect of which was very

doubtful, continued till 1801, when a provincial statute (41 Geo. III, ch. 4, s. 2, incorporated in the Consolidated Statutes, ch. 34, s. 3) provided as follows: "Whereas doubts have arisen touching the method now followed of proving last wills and testaments, made and executed according to the forms prescribed by the laws of England, before one or more of the judges of the courts of civil jurisdiction in this province: be it therefore further enacted, that such proof shall have the same force and effect, as if made and taken before a court of probate." At first sight, it certainly appeared to their lordships that this language availed to introduce the law of England, with respect to the conclusiveness of a probate duly granted into the law of Canada, and that, where, as in the present case, a suit as to the validity of the will had been contested in open court, both parties appearing, pleading and one examining, the other cross-examining witnesses, and probate had then been granted, the same question could not be raised again at all events between the same parties before another tribunal; but that the production of the probate would operate as an estoppel to any such action. This moreover, appears to their lordships to be the true construction of the words, "such proof shall have the same force and effect as if made and taken before a court of probate." Their lordships, however, think that they cannot consider this matter now as *res integra*. They cannot disregard the practice of the Canadian Courts, with respect to it, for the last 70 years, and they have therefore made as careful an investigation into this practice as the circumstances permit. It appears, in the first place, that no appeal has ever been instituted from a decree or grant of probate made by the court; that it is very doubtful whether any allegation or plea as to the merits, for instance, a plea of allegation or plea setting up insanity or undue influence could be prepounded, or would be admitted on an application for probate. It is enacted by the 23rd sec. of the 78th ch. of the C. S. L. C., in the year 1861, that: "Any judge of the Superior Court, at any place where the said court or the Circuit Court is appointed to be held, shall, in court or out of court, in term or out of term, or in vacation, and any prothonotary of the Superior Court at the place where his office is therein held, shall, out of court, but in term or out of term, have and may exercise within and for the district in which such place as aforesaid lies, the same power and authority as is then vested in the Superior Court and the judges thereof, in what respects the probate of wills, the election and appointment of tutors and curators as well under the general law as under the provisions of ch. 87 of the C. S. relating to insolvent debtors, or any other act, the taking of

the counsel and opinion of relations and friends in cases where the same are by law required to be taken, the closing of inventories, attestation of accounts, *insinuations*, affixing and taking off seals of safe custody, the emancipation of minors, the homologation or refusal to homologate proceeding had at any *avis de parents* called or held by or before any notary, and other acts of the same nature requiring despatch, and the proceedings in all such cases shall form part of the records of the Superior Court at the place where they are had, or of the Circuit Court at such place, if the Superior Court be not held there." 2. " But the appointments and orders made by any prothonotary under this section or made under the same by any judge out of court, shall be liable to be set aside by any judge of the said court sitting in the same district in court and in term, in like manner and under the provisions of law in and under which appointments and orders made by one or more judges out of court in matters requiring despatch may be set aside by the Superior Court." (12 Vic., ch. 38; 20 Vic., ch. 44, sec. 91) In the C. C. L. C. which became law in 1866, therefore, after the making of the will in question, it is enacted (art. 856) : " The originals and legally certified copies of wills made in authentic form make proof in the same manner as other authentic writings." Art. 857 : " Holograph wills and those made in the form derived from the laws of England, must be presented for probate to the court exercising superior original jurisdiction in the district in which the deceased had his domicile, or, if he had none, in the district in which he died, or to one of the judges of such court, or to the prothonotary of the district. The court, or judge, or the prothonotary, receives the depositions in writing and under oath of witnesses competent to give evidence, and these depositions remain affixed to the original will, together with the judgment, if it have been rendered out of court, or a certified copy of it, if it have been rendered in court. Parties interested may then obtain certified copies of the will, the proof and the judgment, which copies are authentic and give effect to the will until it is set aside upon contestation. If the original of the will be deposited with a notary, the court or judge, or the prothonotary, causes such original to be delivered up." Art. 858 : " The heir of the deceased need not be summoned to the probate thus made of the will, except it is so ordered in particular cases. The functionary who takes the probate takes cognizance of all that relates to the will. The probate of wills does not prevent their contestation by persons interested." In the 4th Report of the Commissioners which preceded the enactment of the Civil Code, it is said, p. 179 : " The 3rd section treats of the proof of wills and also

of the preliminary probate, before a judge, of such as have not been made in authentic form. A will frequently concerns several parties by all of whom it would be difficult to have it acknowledged, though these persons and even third parties, be interested in submitting its validity without delay to a preliminary test. The proceeding adopted for this purpose is well known in England and in this country under the name of probate; it is more particularly in use in England where wills have no form corresponding with our authentic form. In the old French law, as well as in the ancient practice in this country, traces are still found of a similar probate as regard holograph wills. It is not, however, necessary to extend the researches upon this point, the probate of holograph wills and wills made in the English form having uniformly been effected in the same manner, which is that of the common form of probate adopted in England, where a more solemn form of probate is also practised, to which the parties interested are summoned and by which they are bound. This latter form of probate is not in use in this country, unless it be compared to a contested action before the courts. The probate here takes place before a judge and out of court. Our provincial statute of 1801 merely says that the form of probate then in use shall continue to be practised." The *contestation* spoken of in the Report and the Code does not appear to mean, as it would in England, a suit in the Court of Probate, before probate is granted or enforced, but, in some other suit, a suit before a civil court, in which the validity of the will is impugned. Upon the whole, it appears to their lordships that, by the uninterrupted practice and usage of the Canadian courts of justice, since 1801, the law has received an interpretation which does not affix to the grant of probate, even in the circumstances of this case, that binding and conclusive character which it has in England, and that, according to that interpretation, it was competent to the respondents to impugn the validity of this will, by way of defence to the action brought by the appellant for the payment of the annuity. Their Lordships think that they ought not to advise Her Majesty that a different construction ought now to be put upon the law. With regard to the form of action adopted in this case, their Lordships do not find that any objection was taken to it in the Court below. It remains to consider the second branch of contention. It has been argued on behalf of the appellant: (1) That, though the deceased intended to make a will in solemn form, according to the French law, yet, if he did in fact make one, bad according to that, but good according to the English law, it is valid. Their lordships have no doubt that this proposition is true. (2) It had been argued that, if the judge

was wrong in granting probate of both the papers, at all events, the unfinished paper, written by the notary from the instructions of the deceased, was a valid instrument, according to the law of England, before the *Wills' Act* of 1837, 7 Will. IV and 1 Vict., ch. 26, and that the appellant is content to have probate of that paper alone. Their Lordships are, therefore, relieved from the necessity of considering whether a nuncupative form of will was valid in Lower Canada, at the date of Prudent Malo's death, and before the recent Code came into operation, as to which, however, they desire not to be considered as expressing any doubt whatever, or whether a probate could be properly granted of a nuncupative will and unfinished instructions, as together containing the will of the deceased. The question before their Lordships is reduced within these limits; Is the paper of unfinished instructions such a document as would have been entitled to probate under the law in force in England, before the present Wills' Act? For, if so, it was before the promulgation of the Code, which appears to have adopted the Wills' Act, a goodwill in Canada, under the provisions of the Quebec Act, 14 Geo. III, ch. 83. Upon this point their Lordships entertain no doubt. The law is very clearly laid down in *Montefiore* vs *Montefiore*, 2 Add., p. 357, by a most experienced judge, Sir John Nicholl: "The legal principles," he says, "as to imperfect testamentary papers, of every description, vary much according to the stage of maturity at which those papers have arrived. The presumption of law, indeed, is against every testamentary paper not actually executed by the testator, and *so executed*, as it is to be inferred, on the face of the paper, that the testator meant to execute it. But if the paper be complete *in all other respects, that presumption is light and feeble, and one comparatively easily repelled.* For intentions, *sub modo* at least, need not be proved in the case; that is, the court will presume the testator's intentions to be as expressed in such a paper, on its being satisfactorily shown that its not being executed may be justly ascribed *to some other cause*, and not to any abandonment of those intentions, so expressed, on his, the testator's part. But where a paper is unfinished, as well as unexecuted (especially where it is just begun, and contains only a few clauses or bequests), not only must its being unfinished and unexecuted be accounted for, as above, *but it must also be proved (for the court will not presume it) to express the testator's intentions*, in order to repel the legal presumptions against its validity. It must be clearly made to appear, upon a just view of all the facts and circumstances of the case, that the deceased had come to a final resolution in respect to it, as far as it goes: so that by establishing it, even in such its imperfect state, the court will give effect to, and

not thwart or defeat, the testator's real wishes and intentions in respect to the property which it purports to bequeath, in order to entitle such a paper to probate in any case in my judgment." He then goes on to say, 2 Add., pp. 359-60: "If the instrument is (as it clearly is), in legal construction, one in progress, merely, and unfinished, as to the body of the instrument, the legal presumption, surely, is that, had the deceased not been prevented from finishing it, he would have gone on to provide for his children in a subsequent part of the instrument. I cannot ascent to the proposition contended for by one of the counsel, that, if a testator dies while the instrument is in progress, that instrument, '*so far as it goes*,' be its contents and effect what they may, must be valid. I know of no principle to that broad extent ever laid down; nor was any authority cited in support of it. The rule which I take to operate, in the case of every unfinished paper, is this: Can the court infer that, by pronouncing for it, it will carry into effect what it collects, from all the circumstances of the case, to have been the deceased wish? In that event it will be its duty to pronounce for it, but surely not, if it sees reasons to believe that, by so doing, it will defeat or counteract, instead of giving effect to that wish." In another case, *Nathan* vs *Morse*, 3 Phil. Ecc. Rep., p. 465, the same learned judge said: "The facts are satisfactorily established. I have no doubt in pronouncing this to be the will of the deceased, as far as to the appointment of the executor: but it is perfectly clear that the other part was not committed to writing during the life of the deceased. Although the court goes the utmost length to give effect to intention clearly proved and reduced into writing in the lifetime of the testator, yet it has never held that anything added to a will after death can be established. Death consummates the instrument; nothing can be added afterwards. The last clause must be pronounced against and struck out of the will. I have no doubt of pronouncing for the will without it." It was suggested that these decisions, which were made in 1820-22, were judicial developments of the doctrine, as to imperfect testamentary papers, and were not intended to be incorporated into the Canadian law by the statute of 1801, but, unfortunately for this argument, various decisions of Sir G. Lee, a most learned ecclesiastical judge, in 1707, fully establish the doctrine which Sir John Nicholl, in 1820 21, did not, in truth, develope, but declared to be acknowledged existing law. There can be no doubt that, in this case, it did completely express the wishes of the testator, and, therefore, tried by the principles laid down in these and other cases, the paper containing the instructions written out by the notary is entitled to probate. It remains only to consider the

objection that the evidence by which these instructions are proved to contain the testamentary intentions of the deceased is inadmissible, according to the *lex fori*, that is the Canadian French law, and, for this position art. 1233, § 7, was relied upon which requires that there must be a *commencement of proof in writing* (*commencement de preuve par écrit*), in order to admit the oral testimony of witnesses. If it were necessary to consider whether, in this case, this condition, as to the commencement in writing had been fulfilled, their Lordships would be strongly inclined to held that it had been fulfilled, but, in truth, the case is not one to which the doctrine of the *lex fori* prevailing as to the admission of evidence is applicable at all. The law which introduced into the colony the English law, as to wills, must be considered as having introduced it with all its incidents, and, therefore, with the admissibility of oral evidence, without which, indeed, the new law would be nugatory and of no effect. Their Lordships have, therefore, arrived at the conclusion that the judgment appealed from should be reversed and that the judgment of the Superior Court of Canada, in favor of appellant should be affirmed, and that the respondents should pay the costs of this appeal and those of the Court of Queen's Bench in Canada. (14 *J.*, p. 141 ; 16 *J.*, p. 288 ; 2 *R. L.*, p. 186 ; 3 *R. L.*, p. 606 ; 2 *R. C.*, p. 229, et 8 *Moore's P. C. Rep., N. S.*, p. 347)

BARNARD, avocat de la demanderesse.

LAFLAMME, avocat des défendeurs.

SALE.—DELIVERY.

COURT OF QUEEN'S BENCH, IN APPEAL,
Montreal, 8th March, 1870.

Coram CARON, J., DRUMMOND, J., BADGLEY, J., and MONK, J.

LÉANDRE FRANCHÈRE, appellant, *and* THOMAS GORDON *et al.*, respondents.

Held : That the tender of the thing sold must be made at such an hour upon the last day as will give the vendee time to weigh and examine.

Plaintiff sued defendant for the price of 59 tons of hay deliverable at the town of St. John's, Province of Quebec, on the ten days following the date of the sale alleged to have taken place on the 29th May, 1867. He alleged the delivery of the 59 tons of hay within the ten days and refusal of de-

fendants to accept. The defendants denied the contract such as plaintiff sets up, and that plaintiff was bound to deliver within a reasonable time before sunset, so as to enable defendants to have examined and weighed the hay which had been tendered on board a barge in the Richelieu River at 6.45 p. m., of the 8th June, not being such a time as was reasonable but dangerous to examine the hay by candle light.

The Superior Court, at Montreal, MONDELET, J., delivered, on the 30th October, 1868, the following judgment : " La Cour, considérant que le demandeur a prouvé les allégués essentiels de sa déclaration, et, nommément, qu'il a bien et dûment livré aux défendeurs, dans le port de la ville de Saint-Jean, dans le district d'Iberville, le huit juin 1867, cinquante-neuf tonneaux de foin, de deux mille livres pesant chacun, à raison de $17.75, par chaque tonneau, que le demandeur avait, le 29 mai 1867, vendus aux défendeurs, à Montréal, dans le district de Montréal ; considérant que les défendeurs n'ont pas prouvé, ni établi les allégués de leur plaidoyer, lequel doit être, et il est, par les présentes, débouté ; considérant qu'il est acquis en preuve que les défendeurs ont, sans aucune raison, mais à tort et injustement, refusé de recevoir ladite quantité de foin ledit huit de juin 1867 ; considérant que par la vente qu'a dû faire et a faite de ladite quantité de foin au nommé Théophile Arpin, pour le compte des défendeurs, le demandeur n'a pu former et n'a pas formé le prix entier et la valeur desdits cinquante-neuf tonneaux de foin, mais, au contraire, cette vente à Théophile Arpin a produit $472 de moins que n'aurait produit ladite quantité de foin, si les défendeurs, au lieu de refuser de la recevoir, en avaient accepté la livraison et payé le prix ; considérant qu'à ladite somme de $472, il convient d'ajouter $23, savoir pour coût de deux protêts signifiés aux défendeurs, à la réquisition du demandeur, et $14 que le demandeur a payés pour deux jours de retard du bateau sur lequel était chargé le foin, lesquelles sommes réunies à celle de $472 susmentionnée forment celle de $495 que le demandeur a droit de recouvrer des défendeurs ; cette cour condamne les défendeurs, conjointement et solidairement, à payer au demandeur la somme de $495, avec intérêt sur icelle à compter du 19 juin 1867, jour de la signification de l'action aux défendeurs."

The case was inscribed by defendants for review before three judges in Montreal, and the judgment rendered in review, on the 29th January, 1869, (MONDELET, J., BERTHELOT, J., and BEAUDRY, J.) maintained defendants' exception and dismissed plaintiff's action, and is as follows : " La cour Supérieure, siégeant à Montréal, en cour de revision, considérant que le demandeur n'a pas prouvé la convention par lui

alléguée dans sa déclaration, savoir de la vente aux défendeurs de cinquante-neuf tonneaux de foin, livrables à Saint-Jean, à $17.75 par tonneau ; considérant qu'il appert, par le memorandum sous seing privé produit à l'enquête par les défendeurs et par les réponses de James-C. Sinton, l'un des défendeurs, que le demandeur s'est engagé, le 29 mai 1867, à leur livrer la quantité de soixante tonneaux de foin, à $17.75, livrables à Saint-Jean, engagement que les défendeurs ont accepté, pourvu que ce fût de bon mil, livrable sous dix jours, à Saint-Jean, à $17.75, payable comptant, lors de la livraison ; considérant que, suivant cette convention, le demandeur était tenu de livrer cette dernière quantité de foin au lieu indiqué et en temps opportun pour que les demandeurs pussent en recevoir la délivrance dans le délai stipulé, conformément aux dispositions contenues dans les articles 1063, 1069, 1152 et 1474 du Code Civil ; considérant qu'il appert, par la preuve, que le demandeur n'a fait rendre à Saint-Jean la quantité de foin mentionnée en sa déclaration qu'après six heures du soir du dernier jour du délai stipulé pour l'exécution de la convention, et qu'il est également établi, par la preuve, que l'examen et le pesage de ladite quantité de foin ne pouvait se faire de nuit, ni en moins d'un jour, si toutefois on pouvait se procurer l'aide nécessaire ; considérant que, par le délai du demandeur, les défendeurs ont été mis dans l'impossibilité de recevoir la délivrance du foin dans le délai fixé par la convention, que la vente n'a pu, conséquemment, être parfaite, et que les défendeurs ont, par là, été libérés de leur engagement ; considérant que, pour les motifs ci-dessus, il y a erreur dans le jugement du trentième jour d'octobre 1868 ; cette cour infirme ledit jugement et déboute le demandeur de son action. L'honorable juge MONDELET, dissident."

Cette cause fut portée en appel par le demandeur.

BADGLEY, J. : This was an action on a contract for sixty tons of merchantable hay. Fifty-nine tons only were delivered, and the judgment in revision annuls the contract on account of this difference of one ton. This is a very close calculation. The articles of the Code referred to are not to be construed so strictly as has been done by the Court of Review. This is the only *motif* of that judgment. I am against plaintiff on other grounds. He sold merchantable hay to be delivered on a certain day at St. John's. The hay arrived on a barge, at St. John's, at half past six o'clock, in the evening of the last day limited for its delivery. The 1474th article of the Code enacts that there can be no delivery of moveables sold by weight, until weighed, and that could not be done either satisfactorily or at all before midnight of that day. The witnesses agree in saying that it would take two

days to deliver and weigh. Besides the hay was not of a merchantable quality. It was mixed up with swamp hay. There was only about one-third of it good Timothy hay. Some of the bundles had good hay on the outside and poor in the centre. Again, there is another important point. Franchère was not the owner. He was acting as Bazin's agent for the sale of the hay. Bazin, afterwards, sold the hay on his own account. Franchère had no interest and could not bring the action. The judgment in review should be maintained, but not on the *motif* given that one ton was lacking, but for the reasons above set forth. Judgment against plaintiff confirmed. (1) (14 *J.*, p. 152, et 2 *R. L.*, p. 187)

JETTE & ARCHAMBAULT, attorneys for appellant.

W. H. KERR, attorney for respondents.

DROITS DE DOUANE.—RESPONSABILITE DU PERCEPTEUR.

COUR DU BANC DE LA REINE, EN APPEL,
Montréal, 21 mars 1872.

Présents : DUVAL, J. en C., dissident, CARON, J., dissident, BADGLEY, J., DRUMMOND, J., et MONK, J.

PATRICK ROONEY, demandeur en Cour de Circuit, appelant, *et* JOHN LEWIS, ès-qualité de percepteur des douanes, défendeur en Cour de Circuit, intimé.

Jugé : Que l'importateur de marchandises, qui n'est pas satisfait de l'évaluation des marchandises importées faite par le percepteur des douanes, peut, après avoir payé sous protêt les droits exigés par le percepteur, recouvrer de ce dernier personnellement l'excédent des droits qu'il n'aurait pas dû charger, quoiqu'il n'ait pas demandé une nouvelle évaluation des marchandises importées sous la sec. 33 du ch. 17 des Statuts Refondus du Canada de 1859.

Ci-suivent les remarques des juges de la Cour Supérieure siégeant en revision à Montréal (MONDELET, J., MACKAY J., et TORRANCE, J.), qui, le 28 février 1870, ont rendu jugement rejetant l'action du demandeur.

MONDELET, J. : The plaintiff, a merchant and importer of this city, brought an action, in 1866, in the Circuit Court for the district of Montreal, against defendant, the then acting collector, to recover $186.40, which, he alleged, was illegally exacted from him by defendant, being an excess on the valuation of goods imported by plaintiff from Scotland. It is pretended that the fair value of these goods was $560.20, and not $746.40, and, moreover, that the duty, at the custom house

(1) Cited by respondents : C. C., art. 1163.

here, should have been measured on the fair market price, in the principal markets in Scotland, at the time of the purchase. The defendant, on the contrary, maintains that it is to be determined by the fair value of the principal markets at the time of the exportation. It was, of course, necessary for plaintiff to prove: 1st, the time of purchase; 2nd, the time of exportation; 3rd, the fair value of the principal markets of Scotland. Strange to say, none of these indispensable proofs are to be found in the answers of the witnesses, who, on a *Commission Rogatoire*, were examined in Scotland on behalf of plaintiff. It appears, by the evidence, that Rooney had made an advance of £500, for the purpose of getting the goods, but, at what time we do not know, nor is it shown when the goods were manufactured, delivered and exported. The invoice has not been substantiated by proper evidence. The groundwork, or, rather, what should have been the groundwork of his claim, is therefore altogether wanting. I need not dilate upon the question as to whether the appraisement is to be made on the fair value of the goods at the time of the exportation, or at that of the purchase. The law is clear; there can be no two opinions on that point. It is at the time of the exportation, and not at the time of the purchase. A difficulty was started at the hearing of the case, with respect to plaintiff, subsequent to the notice he gave of his intention of paying under protest, paying instead of having the appraisement revised by two merchants, as he was invited by the acting collector to do. Is this a renunciation? Is the plaintiff deprived of his recourse? We find, in our statute, a word upon the interpretation on which turns the solution of the question as to whether Rooney, not having resorted to the mode of submitting his claim to appraisers, and choosing to pay rather than do it, has or has not waived his right of any recourse. A case which was decided by the Supreme Court of the United States, *Rankin et al.* vs *Hoyt*, in 1846, is cited against the pretensions of plaintiff. By this decision, it appears that "the importer had a right to appeal to another board of appraisers, differently constituted, and, if he did not choose to resort to them, he cannot, with much grace, afterwards, complain that an overestimate existed." It has been argued that the word "may," to be found in our statute confers no obligation upon the importer to refer the difficulty to appraisers, and that no other expression but "shall" could have such binding effect. The answer to this objection is that, if the word "shall" had been used in the statute, nothing could have been done, no payment could legally have been received by the collector, as long as such reference to appraisers had not taken place, even when

all parties were agreed, which would be absurd. The interpretation, and the only rational one, is that it is optional for the importer, either to refer his case to appraisers, in order to save his recourse, or to pay the dues, and there the matter ends. For the above reasons, I am in favor of reversing the judgment appealed from (BERTHELOT, J.) Circuit Court, Montreal. Both on the want of evidence and on law, plaintiff's action should be dismissed.

MACKAY, J.: The appraisement in 1866 gave an advance of 33½ per cent, beyond invoice value. Rooney paid, although notified by defendant, that, if dissatisfied, he could get a second appraisal by two merchants. McLellan, one of the witnesses examined, proves clearly that the $186.40 in dispute was paid only after such offer to Rooney. He preferred to pay rather than have recourse to the arbitration of merchants. The law referring to this case is found in Con. Stat. Can., cap. 17. It enacts that the collector, if doubting the truth of invoice valuations, may order a custom-house appraiser to value the goods, and, upon his appraisal, the collector may insist on further duty, but the importer need not pay this unless he please. He may insist, before making any payment, upon a further appraisal by two merchants, upon whose report the duties are to be *finally settled.* Before this statute, the 10 and 11 Vic. (1847), cap. 31, ordered the duties to be finally determined upon merely one appraisement, by two appraisers appointed by the Government. So, the later law afterwards put into the Consolidated Statutes was a liberty extra to importers. This law (by which this case and *Joseph* vs *Lewis* are to be disposed of) is ordered by itself to be interpreted in favor of an efficient collection of the revenue. Section 33 says that: "If the importer is dissatisfied with the appraisement made as aforesaid,—he *may* forthwith give notice in writing to the collector, who *shall* select two discreet merchants, &c." But, plaintiff says: "The act does not provide that it shall be final, if the importer fails to call for a second appraisement by merchants chosen by the inspector. The effect of the Act is to give the importer the right to apply to a tribunal of summary jurisdiction if he chooses." He may forthwith, &c., but neither directly nor by implication is he *compelled* to do so. For his right to apply to the ordinary tribunals for redress from illegal exactions is nowhere taken from him." "The distinction observable in the use of the two words "may" and "shall" in sec. 33 of our Act, as applicable to the individual and the public officer respectively, is quite remarkable," says the plaintiff, and he adds: "There are nearly analagous cases in 9 Price, p. 310, and in 10 Price, p. 138. In one, a landlord was authorized to lay

a complaint before two justices on a certain subject, who were empowered to adjudge upon it. But it was held that he was not thereby prevented from applying to the court if he chose." As to the two words "may" and "shall" referred to, they are proper words in their places. Had "shall" been used where "may" is, the importer would have had one right less, and look at the absurdity it would have led to. The second appraisal in all cases would be necessitated, though the importer might be willing to submit to the first, though dissatisfied. The two words "may" and "shall" have occurred in like places in other Customs Acts in all countries. Though the Act may not expressly make the first appraisal final, that first appraisement may be rendered a finality, that is if the importer pay; preferring to do so rather than go into further appraisement. Standing as at the date of plaintiff's payment to defendant, after the first appraisal, what right had plaintiff? Had he the right to elect to come here, or to go before the tribunal of the merchants? "He might elect to come here," he says; but the court holds the contrary. If the plaintiff prevailed, the Dominion would not get the duties of the statute, but duties after the mode of plaintiff resorting to this court. The plaintiff's case is very different from that of the landlord in the case in Price; and very different from *Sharp* vs *Warren* cited, where a summary remedy was given by statute, and it was insisted that the parties could not have recourse to their previous right to sue by action at law. But the court held the contrary and that the objection could only have weight if the statute had been imperative. Looking at the Customs Act of the Consolidated Statutes, at its object, and the tribunal of merchants it erects, we cannot doubt that plaintiff had to resort to that tribunal if dissatisfied, and could resort to no other. That was and is a tribunal well fitted to dispose of such cases. The work to be done in such cases requires inspection of all manner of goods. How could this court perform such work? Then the duties are to be *finally* those of that tribunal (sec. 33), and very properly. It concerns the public that the revenue be promptly gotten in. But, under plaintiff's system, enormous sums of Customs duties money might be put into the *limbo* of the ordinary law courts, and enormous amounts of Customs duties money might have to be held by the Treasury as in suspense. The plaintiff says that his views are correct, and that this may be established by a reference to the recent act consolidating and amending the Customs laws, 31 Vict., cap. 6, sec. 45. This statute adds a new provision to the former one, namely that the decision of the proper officers shall be held to be final, unless the importer gives notice of his dissatisfaction and

appeal to the minister of Customs, whose decision shall thereupon be *final, unless suit be brought for the recovery back of the duties illegally exacted,* within sixty days after such decision; and it expressly enacts that: "No suit shall be main-" tained in any court for the recovery of any duties alleged " to have been erroneously or illegally exacted, until such " decision as last mentioned shall have been first had on such " appeal." But the recent Act is new, positive law, and more favorable to importers than the earlier Acts. The 10 and 11 Vic. was very unfavorable to the importer; under it there was only one appraisement, and it was decisive and final, settling the true and real value of goods at what was so appraised. Then came the 12th Vic., ch. 1, the Act that these cases turn on; it allowed an appraisal beyond the first one, and such appraisement was evidently meant to be final. It does not read that the appraisement shall be final and conclusive, "unless" etc Then comes the new law, 31 Vic., referred to by the plaintiff; it is still more favorable to the importer; but it is not to control this case. (His Honor cited AYLWIN, J., in *Moffatt* vs *Bouthillier*, 5 L. C. Rep., p. 311 (1), and a case in 4 Howard's R., to support the position that the plaintiff had no right to sue in this court, having refused to avail himself of the tribunal of merchants.) The reading of these cases with our statute law leads the court to hold that plaintiff has no right of action against defendant. But plaintiff is doubly estopped; for, from the evidence, he paid what he did under such circumstances, and with such knowledge as prevents him getting back what he paid. His goods had not been seized. The plaintiff was not in defendant's power. He had other rights and other remedy to use if he did not choose to pay defendant. But this other remedy was waived. Look at the case as at the time immediately before plaintiff paid. Could Rooney, for instance, after notice of the first appraisement, refusing to pay the duties asked of him, have sued defen-

(1) Sous les dispositions des sections 12, 13, 15, 16, 24, 26 et 79 du ch. 31 des Statuts du Canada de 1847, 10 et 11 Vict., intitulé: "Acte pour abroger et refondre les droits de douane actuels en cette Province, et pour d'autres fins y mentionnées"; des sections 1, 2, 3, 6, 8, 9, 15 et 29 du ch. 1 des Statuts du Canada de 1849, 12 Vict., intitulé: "Acte pour amender la loi relative aux droits de douane"; et des sections 3, 5 et 8 du ch. 85 des Statuts du Canada de 1853, 16 Vict., intitulé: "Acte pour amender de nouveau les lois relatives aux droits de douane," les droits, imposés sur les importations de marchandises d'un pays étranger en cette province, peuvent être chargés d'après la valeur des marchandises à l'époque de leur achat, ou d'après leur valeur à l'époque de leur exportation dans le cas d'une augmentation de leur valeur pendant l'intervalle de temps qui s'est écoulé entre leur achat et leur exportation. (*Moffatt et al.* et *Bouthillier*, C. B. R. en appel, Montréal, 4 juillet 1855, LAFONTAINE. J. en C., AYLWIN, J., dissident, DUVAL, J., et CARON, J. confirmant le jugement de C. S., Montréal, 21 mars 1854, 5 D. T. B. C., pp. 235 et 305)

dant? Could he have revendicated these goods and dispossessed the Customs without paying? No; he could only have moved for the reference to the merchants. If, however, he preferred to make a finality of the first appraisement, he could, on paying (as in this case he did), obtain his goods, and, if they were then refused, revendicate them. As to the value of the goods, the court is with the plaintiff.

TORRANCE, J., observed that his opinion was based mainly on the authority of the case cited from 4 Howard's Rep., pp. 327-335, *Rankin et al.* vs *Hoyt*.

The judgment of the Court of Review is *motivé* as follows: "The court, considering that there is error in the judgment of the 30th of June, 1869, revising said judgment, doth reverse the same, and, proceeding to render the judgment that ought to have been rendered in the premises; considering that the duties upon such importations as the plaintiff referred to in his declaration were, at the time referred to, appointed to be ascertained, finally adjusted and determined, and levied in and by the mode prescribed by chapter 17 of the Consolidated Statutes of Canada; considering that plaintiff, though, at first, dissatisfied with the appraisement that defendant had caused to be made of the woollen goods of plaintiff, paid deliberately, in April, 1866, the amount of duty that defendant asked and took from him, he, plaintiff, declining to have or move towards the other or further appraisement, to wit, by two discreet and experienced merchants, according to section 33 of said chapter 17 C. S. C., and preferring to pay what he did to defendant; considering that plaintiff has not proved that defendant wrongfully collected, or took from him the money amount sought to be recovered by the present action; considering that, under the circumstances of this case, defendant was justified in taking from plaintiff the full amount for duty that plaintiff paid him in April, 1866; considering plaintiff's action in the Circuit Court unfounded, for the reasons aforesaid, and under the law, the court doth dismiss the same. Mr. Justice Mondelet concurs in the judgment, but is of opinion that the judgment should go further, and decide that there is, in this cause, no evidence of the time at which the goods were exported from the place where they were bought, nor of the fair market value of such goods at the place whence they were exported.

Here follows the judgment of the Court of Appeals: "The court, considering that appellant hath established that, at the time of the exportation from Dumfries, in Scotland, of the five cases of woollen goods in the declaration mentioned, the valuation whereof for customs duty is the subject of this contestation, the prices contained in the invoices thereof, where

the fair market value of the said woollen goods, at Dumfries, where the same were purchased by appellant for exportation to this province, and chargeable with duty upon the said value upon the entry made of the said woollen goods for duty upon such value, at the port of Montreal, where respondent was at the time of making such entry, the acting collector of customs for the collection and receipt of the said duty as in the said declaration mentioned; considering that of the said duty levied upon the said woollen goods, at the entry thereof aforesaid, the sum of $186.40 was exacted and collected by respondent from appellant in excess of the legal amount of duty chargeable and leviable upon the said woollen goods under and by virtue of the ch. 17 of the C. S. C. then in force and effect; considering that the said sum of $186.40 was so paid by appellant under protest by him against the illegal and wrongful exaction thereof by respondent, and under his reservation and notice to him given of his right to demand and recover the same in such manner as allowed by law; considering that the appraisement for valuation of the said woollen goods for duty and upon which the said excessive duty was exacted and paid was illegal and wrongful and was not by law nor by the provisions of the said chap. 17, and specially the 33d sec. thereof, final and conclusive against the legal rights of appellant to recover the said excessive duty by action at law against respondent; considering that, in the judgment rendered at Montreal by the Superior Court in revision, on the 28th of February, 1870, there is error, and that there is no error in the judgment of the Circuit Court, at Montreal, rendered *en première instance* on the 30th of June, 1869; doth for the causes hereinbefore and in the said judgment of the said Circuit Court set forth, confirm the same with costs in favour of appellant against respondent, as well of the Court of Revision as of this court. Chief Justice DUVAL and Mr. Justice CARON, dissenting." (14 *J.*, p. 155; 2 *R. L.*, p. 187, et 2 *R. C.*, p. 232)

HON. J. J. C. ABBOTT, Q. C., for the appellant.

F. P. POMINVILLE, Q. C., for respondent.

ACQUIESCEMENT.

SUPERIOR COURT, IN REVIEW, Montreal, 30th December, 1869.

Coram MONDELET, J., BERTHELOT, J., and MACKAY, J.

JONES *vs* WARMINGTON.

Held: That there is no *acquiescement* when the amount of the judgment tendered has been accepted through error.

On the 25th November, 1869, plaintiff moved the court of Review, that the inscription for revision be set aside, for the following reasons; 1st Because Warmington has acquiesced in the judgment appealed from before the filing and service of the inscription, he having accepted the sum of one dollar and seventy-five cents due to him under the judgment. The defendant, in reply, fyled the following affidavit: "Richard Warmington, the defendant, being duly sworn, doth depose and say: "That, on the day when he was served with the copy of judgment, the bailiff serving the same induced deponent, who was somewhat unwilling and asked time to consult his attorneys, to receive the sum of one dollar and seventy-five cents, representing that, whether deponent received it or not, would not matter in the case; and deponent was also under the impression that, in default of his receiving it, execution might be issued against him for the amount named in the judgment, one hundred and ninety dollars, he being then ignorant of the real effect of the judgment and of the proceedings requisite in the case; that deponent handed the identical money to his attorneys, forthwith, after learning what was intended, and would not have received it at all if he had been cognizant of its effect. That deponent was never served with a judgment before, to his recollection." The court dismissed this motion. (14 *J.*, p. 161, et 2 *R. L.*, p. 188)

D. GIROUARD, attorney for plaintiff.

PERKINS & RAMSAY, attorneys for defendant.

FEMME SEPAREE DE BIENS

COUR SUPÉRIEURE, EN REVISION, Montréal, 31 janvier 1870.

Coram MONDELET, J., MACKAY, J., TORRANCE, J.

ROBERT *vs* ROMBERT dit SAINT-MARTIN *et vir.*

Jugé: Que la femme séparée de biens est tenue au paiement des articles nécessaires et indispensables à l'existence et à l'entretien de sa famille et qui lui ont été fournies à sa demande. (1)

Le 30 avril 1869, la Cour de Circuit, à Montréal, a condamné les défendeurs, le mari et la femme séparés de biens, à payer, conjointement et solidairement, au demandeur, la

(1) Un billet, signé par une femme mariée séparée de biens, est valide bien qu'elle l'ait signé sans l'autorisation de son mari, si ce billet a été donné en paiement d'épiceries et autres choses nécessaires à sa famille qu'elle aurait achetées. (*Rivet et al.* vs *Léonard et vir*, C. S., Montréal, 17 octobre 1848, ROLLAND, J. en C., DAY, J., SMITH, J., 1 *J.*, p. 172, et 5 R. J. R. Q., p. 486)

La femme mariée séparée de biens peut valablement signer un billet à l'ordre de son mari, sans qu'il y soit dit qu'elle ait reçu l'autorisation de son mari pour cela, si le billet est donné en paiement d'épiceries et autres choses nécessaires à la famille qu'elle aurait achetées. (*Cholet* vs *Duplessis et vir*, C. S., Montréal, 28 février 1862, BADGLEY, J., 12 D. T. B. C., p. 303 ; 6 *J.*, p. 81, et 10 R. J. R. Q., p. 44)

Le mari et la femme, séparés de biens par sentence judiciaire, sont tenus, conjointement et solidairement, au paiement d'épiceries et autres choses nécessaires à la vie, qui leur ont été vendues et livrées, quoique ces épiceries et choses aient été achetées par les époux pendant la communauté qui avait d'abord existé entre eux. (*Paquette* vs *Limoges et vir*, C. C., Montréal, 31 octobre 1862, SMITH, J., 7 J., p. 30, et 12 R. J. R. Q., p. 2)

Le mari et la femme séparés de biens sont solidairement tenus au paiement d'épiceries achetées par le mari, lorsqu'elles sont des choses nécessaires à la vie et qu'elles ont été consommées au domicile commun desdits mari et femme. (*Saint-Amand et al.* vs *Bourret et ux.*, C.C., Montréal, 27 février 1863, MONK, J., 7 J., p. 32 ; 13 D. T. B. C., p. 238, et 11 R. J. R. Q., p. 139)

Un billet, signé par une femme mariée séparée de biens, sans l'autorisation de son mari, et donné en paiement de marchandises vendues et livrées, est nul, quoique la femme ait elle-même fait l'achat desdites marchandises. (*Badeau* vs *Brault et ux.*, C. S., Montréal, 30 avril 1857, DAY, J., SMITH, J., et CHABOT, J., 1 J., p. 171, et 5 R. J. R. Q., p. 485)

Une action en recouvrement du prix de marchandises vendues et livrées à une femme mariée séparée de biens doit être rejetée, s'il n'y a preuve que le mari ait autorisé sa femme à en faire l'achat. (*Benjamin et al.* vs *Clarke et vir*, C. C., Montréal, 17 février 1859, SMITH, J., 3 J., p. 121, et 7 R. J. R. Q., p. 397)

Une femme mariée n'est pas responsable du prix d'effets non nécessaires à la vie qu'elle aurait achetés sans l'autorisation de son mari, et les billets qu'elle aurait donnés en paiement du prix de ces effets et qu'elle aurait signés sans y être autorisée sont nuls. (*Danziger* et *Ritchie et ux.*, C.B.R. en appel, Montréal, 9 mars 1864, DUVAL, J., MEREDITH, J., MONDELET, J., et BADGLEY, J., confirmant le jugement de C. S., Montréal, 20 mai 1863, MONK, J., 14 D. T. B. C., p. 425 ; 8 J., p. 103, et 13 R. J. R. Q., p. 169)

La femme mariée séparée de biens, qui vit avec son mari, n'est pas obligée de payer de la viande qu'elle a achetée chez un boucher pour les besoins de la famille ; c'est le mari seul qui, comme chef de la famille, est tenu. Art. 1317 C. C. (*Rousson* vs *Gauvin et vir*, C. C., Montréal, 29 avril 1868, BERTHELOT, J., 13 J., p. 82 ; 1 R. L., p. 86, et 19 R. J. R. Q., p. 138)

somme de $168.33, pour prix et valeur de divers effets et articles d'épiceries, vendus et livrés par le demandeur aux défendeurs, à diverses dates et époques avant le 18 février 1868. " La Cour, considérant que la défenderesse a fait défaut de comparaître et répondre aux interrogatoires sur faits et articles à elle soumis par le demandeur, déclare lesdits faits et articles pour avérés et admis ; et, considérant que le demandeur a établi en preuve les faits essentiels de sa déclaration, et que tous les effets mentionnés au compte produit vendus et livrés à la défenderesse étaient des articles nécessaires et indispensables à l'existence et à l'entretien de la famille des défendeurs ; la cour déclare l'exception péremptoire plaidée par la défenderesse mal fondée en loi, l'en déboute ; en conséquence, condamne les défendeurs, conjointement et solidairement, à payer au demandeur, la somme de $168.33 comme prix et valeur des divers effets et articles d'épiceries et marchandises énumérés au compte produit, et vendus et livrés par le demandeur aux défendeurs, à diverses dates et époques, avant le 18 février 1868, avec intérêt à compter du 20 mars 1868, jour de l'assignation, jusqu'à l'actuel paiement, et aux dépens."

La défenderesse porta cette cause en revision. Elle soumit devant la Cour de Revision la question de savoir si un fournisseur qui fait au mari des avances nécessaires à l'entretien de la famille, peut réclamer le montant de ces avances de la femme, solidairement avec son mari. La femme séparée de biens n'est pas responsable, vis-à-vis les tiers, des avances faites au mari, même pour l'usage de la famille. Chacun des époux doit contribuer aux charges du mariage, dit l'art. 1423 de notre code ; mais cela ne regarde que les époux entre eux, et ne donne aucun droit aux tiers. 7 Pothier, édition Bugnet, *Communauté*, n° 464, p. 255. Le mari peut se charger seul des obligations du mariage, il a un droit contre la femme de la faire contribuer aux charges du ménage, mais il peut renoncer à ce droit, et, si les tiers contractent avec lui, sans faire engager la femme personnellement, vis-à-vis eux, ils n'ont aucun recours contre elle. Le jugement de la Cour de Circuit fut confirmé par la Cour de Revision. (14 *J.*, p. 162, et 2 *R. L.*, p. 188)

R. LAFLAMME, C. R., avocat du demandeur.

J. DUHAMEL, avocat des défendeurs.

CERTIORARI.

SUPERIOR COURT, Montreal, 27th October, 1869.

Coram TORRANCE, J.

Ex parte MARRY, applicant for *certiorari, and* JOHN P. SEXTON, recorder.

Held: That the merits of a *certiorari* may be heard on a rule to quash without inscription for hearing.

TORRANCE, J.: This case is before the court on a rule to quash the conviction. The recorder objects that the case has not been inscribed as required by C.P. C., art. 1231. The court is of opinion that an inscription is unnecessary. The rule has been regularly issued and served, and cause must be shewn against it without an inscription. (14 *J.*, p. 101)

S. B. NAGLE, for petitioner.

E. CARTER, Q. C., counsel.

R. ROY, Q. C., for recorder.

MUNICIPAL BY-LAW.

SUPERIOR COURT, Montreal, 18th December, 1869.

Coram TORRANCE, J.

Ex parte MARRY, petitioner for *certiorari, and* JOHN P. SEXTON, recorder, *and* the MAYOR *et al.* OF THE CITY OF MONTREAL, prosecutors.

Held: 1. That a by-law is bad which gives a discretion to the recorder or justice presiding in the Recorder's Court, where the statutes upon which the by-law is based only allow a discretion to the council making the by-law.

2. That a conviction is bad which orders imprisonment in default of immediate payment of a sum of money, when the by-law upon which it is based is in the alternative, imposing a fine or imprisonment.

3. That a conviction is bad which gives costs, when the by-law upon which it is based gives no jurisdiction as to costs.

PER CURIAM: On the 6th August last, John P. Sexton, recorder, presiding in the Recorder's Court, of the city of Montreal, convicted the petitioner of an alleged offence, as follows: That he, Thomas Marry, on the 27th July, 1869, at the said city, did sell diluted milk, to wit, one pint of the said diluted milk, the said milk being, then and there, diluted

in the proportion of twelve gallons of water to one hundred gallons of pure milk, contrary to the by-laws of the city of Montreal, in such case made and provided ; and the court did adjudge and condemn Marry, for his said offence, to forfeit and pay to the mayor, aldermen and citizens of the city of Montreal, the sum of two dollars and fifty cents and costs, amounting to the further sum of seven shillings and six pence : and, if the said several sums were not forthwith paid, the court did adjudge Marry to be imprisoned in the common gaol of the district of Montreal, at the said city, and there kept for the space of thirty days, unless the said several sums should be sooner paid. The conviction is before this court on a writ of *certiorari* , and the petitioner has moved the court to quash the conviction. By 23 Victoria, chap. 72, sect. 13 (A. D. 1860), the council (of the city corporation) " may impose such fines not exceeding $20, *or* such imprisonment not exceeding 30 days, *or* both, as they may deem necessary, for enforcing their by-law." By 27-28 Vic., ch. 60, sec. 50, the council has " power, in any by-law, for enforcing the provisions thereof, to impose a fine not exceeding $20 and costs of prosecution, with imprisonment in the common gaol or in the house of correction, at hard labor, for a period not exceeding one calendar month." By 32 Vict., ch. 70 (Quebec), sec. 17, " in addition to the power already accorded, it shall be lawful for the said council to impose, in and by such by-laws, a fine not exceeding $20 and costs of prosecution, to be forthwith leviable on the goods and chattels of the defendant ; or to enact that in default of immediate payment of the said fine and costs, the defendant may be imprisoned in the common goal, for a period not exceeding two months, the said imprisonment to cease upon payment of the said fine and costs, or to impose the said fine and costs in addition to the imprisonment." The by-law under which the petitioner had been convicted was passed on the 7th June, 1869, and section 7, upon which the conviction was based, is in the following words : " Any person who shall offend against any of the " provisions of this by-law, shall forfeit, and pay a fine not " exceeding $20, or be liable to an imprisonment not exceed- " ing 30 days for each and every offence." Has this by-law followed the directions of the statutes ? It has been urged against the by-law that it has given a discretion to the recorder, as regard the amount and character of the penalty, which the statutes have only given to the council itself. Further, it has been urged, against the conviction itself, that it does not conform to the by-law, inasmuch as the by-law is in the alternative imposing a fine *or* imprisonment, and the conviction orders imprisonment in default of immediate payment, inas-

much also, as the by-law says nothing about costs, and the conviction condemns to costs. On all these grounds, the court is with the petitioner. (1)

"The court, considering that the by-law upon which the conviction has been based gives a discretion to the recorder, or justice presiding in the Recorder's Court, which the statutes made and provided in this matter only allow to the council making the by-law; considering, further, that the conviction doth not conform to the by-law, inasmuch as the by-law is in the alternative. imposing a fine or imprisonment, and the conviction orders imprisonment in default of immediate payment; considering, further, that the by-law gives no jurisdiction as to costs, and the conviction condemns to costs; doth reject the motion of the prosecutors to quash the writ of *certiorari*, and doth make the rule absolute, and doth, in consequence, quash, annul and set aside the conviction of date the 6th August, 1869, in the case n° 1288, wherein the mayor, aldermen and citizens of the city of Montreal were prosecutors, and applicant was defendant, and the court doth condemn the prosecutors, the mayor, &c., to pay the costs." (14 *J.*, p. 163)

S. B. NAGLE, for applicant.

E. CARTER, Q. C., counsel.

R. ROY, Q. C., for prosecutors.

(1) Le ch. 143 des Statuts du Canada de 1855, 18 Vict., intitulé: "Acte pour pourvoir à l'administration et à l'amélioration du havre de Montréal, et au creusage d'un chenal pour les navires entre ce havre et le port de Québec, et pour abroger l'acte maintenant en force pour lesdites fins," décrétait sec. 7: "Ladite corporation des commissaires du havre de Montréal, pour les fins du présent acte, aura le pouvoir et l'autorité de faire des règlements qui ne seront pas incompatibles avec les lois de cette province, ou les dispositions du présent acte, et d'imposer des pénalités en vertu d'iceux n'excédant pas cinq louis courant, ou soixante jours d'emprisonnement contre toutes personnes qui les enfreindront, et de révoquer, changer et amender ces règlements aussi souvent qu'elle le jugera à propos." Aux termes de cette section, les commissaires du havre de Montréal n'ont pas le droit de condamner celui qui a enfreint les règlements qu'ils auraient passés, à l'emprisonnement comme moyen de le contraindre à payer la pénalité imposée par l'un de ces règlements et les frais de la condamnation; ils ne peuvent que condamner le contrevenant à une pénalité ou à l'emprisonnement, ces deux peines étant absolument indépendantes l'une de l'autre; en conséquence, un règlement des commissaires du havre de Montréal, imposant une pénalité et l'emprisonnement à défaut de paiement de la pénalité, est illégal, et la condamnation prononcée en vertu de ce règlement sera cassée sur *certiorari*. (*Rudolph*, requérant *certiorari*, et *Commissaires du havre de Montréal*, 30 décembre 1856, DAY, J., SMITH, J., et MONDELET, J., 1 J., p. 47, et 5 R. J. R. Q., p. 424)

SYNOD OF THE DIOCESE OF MONTREAL.

SUPERIOR COURT, Montreal, 30th April, 1870.

Coram MACKAY, J.

DAVIDSON, petitioner, *and* BAKER, respondent.

Held: 1. That when the certificate of election, granted to a lay delegate to "The Synod of the Diocese of Montreal" by the chairman of the vestry meeting held for the election of lay delegates, is in form and found to be satisfactory by the committee appointed to examine the certificates of such lay delegates, it is not competent to the Synod to enquire into the validity of the proceedings at the vestry meeting, or in any way to try the validity of the election certified to in the certificate.
2. That the second clause of the constitution of said Synod was and is legal.

This was a writ of *quo warranto* for the purpose of ousting defendant from exercising the office of lay delegate to "the Synod of the Diocese of Montreal."

PER CURIAM: The *requête* of petitioner asks that Baker, the defendant, be held to have illegally usurped the office of lay delegate for Christ Church, Sweetsburg, in the Synod of the Diocese of Montreal, and to be guilty of unlawfully holding and exercising said office; that he be ousted from it; that the decision of the majority of the Synod against petitioner, Davidson, be declared illegal; that petitioner be declared to have been duly elected as lay delegate to said Synod from said Church, and that the Synod be ordered to reinstate him as such lay delegate. The petition sets out with stating the Synod incorporation; it then proceed to state an election in March, 1869, at the Easter meeting at Christ Church, Sweetsburg, at which election petitioner was duly elected a lay delegate to the Synod; that he received from the incombent chairman at the meeting a certificate of his election; that he presented it at the Synod in May, 1869, and claimed to take his seat; that the committee to report on certificates passed upon his and approved it, and put his name upon the roll of delegates; that, thereafter, a motion, supported by affidavits, was made by a lay delegate that the name of petitioner should be struck off the roll, and the name of Baker substituted for it; that the chairman ruled this to be out of order; but, upon an appeal from the chair, the majority of the Synod maintained the motion, and Baker then and there was admitted, and petitioner excluded from the Synod, etc. Baker, by his answer, defends the action of the Synod and claims that, at the vestry meeting, at Sweetsburg, he (Baker) was elected; that he had the majority of votes, and the chairman

so declared at the time, but, afterwards, acted to the contrary and gave petitioner, his son, the certificate; that, at the Synod, the chairman could not prevent the Synod disposing of the question as to whether Davidson or Baker had the right to sit; that clause number two of the Synod constitution, relating to qualification of electors, was illegal and void, &c. The 19 and 20 Vic., cap. 141, and 22 Vic., cap. 139, enable the members of the Church of England and Ireland to meet in Synod, the meeting of Synod and the adoption by it of a constitution, &c., followed this 22 Vic., and the second clause of such constitution states who may be lay representatives, and how elected. "2° The lay representatives shall be male communicants of at least one year's standing, of the full age of twenty-one years, and shall be elected annually at the easter meetings, or at any vestry meeting (specially called for such purpose by incumbents, after due notice on two sundays), held by each minister having a separate cure of souls, and all laymen within the cure, of twenty-one years or upwards, entitled within such cure to vote at vestry meetings, or who hold pews or sittings in the church, though not entitled so to vote, who shall have declared themselves in writing to be "Members of the United Church of England and Ireland, and to belong to no other religious denomination," *shall* have the right of voting at the election." And, in clause 5, the certificate of election is given as follows: "This is to certify that at a meeting held this day for the purpose of electing delegates to represent this congregation or parish in Synod, being the parish or mission of——, ——, a communicant of one year's standing, and of the full age of twenty-one years, was elected by the laymen of this congregation, who have a right to vote at such election, by virtue of their having, in accordance with the second clause of the constitution of the Synod of this diocese, declared themselves in writing in a book kept for that purpose, to be members of the United Church of England and Ireland, and to belong to no other religious denomination, and being qualified otherwise under the provisions of said clause. And such certificate of election shall be considered and taken as sufficient proof of the election; and such lay delegate shall continue in office till his successor is appointed." And article 3 of the rules and order of proceedings reads as follows: "3. After this prayer, the clerical secretary shall call over the roll of the clergy, to be furnished by the Bishop, and mark the names of those in attendance; and the secretary shall call over the names of the several parishes, missions or cures, when the certificates of the representatives having been presented, shall be examined by the secretary and a committee of two to be named by the chairman for that purpose; and,

where found satisfactory, the names shall be recorded and read by the secretary." The petitioner received the formal certificate of election from the incumbent of Sweetsburg. Much should be presumed in favour of such certificate, and the returning officer's act ought to be presumed true and honest; that certificate was such presumptive evidence of Davidson's right to the office of lay delegate that, upon it, approved 11th of May, 1869, by the committee, and his name being recorded by the secretary, he ought to have been admitted to the Synod. The certificate so approved ought to have been held by the Synod, then and there, sufficient proof of Davidson's election. The decision of the chairman of the Synod was right; the overruling of it was wrong, and so was the erasing petitioner's name from the roll of delegates, and the inserting of Baker's instead of it. The case has been presented, not only on what was done in the Synod, but petitioner and defendant have also gone upon the merits of the election at Sweetsburg, and petitioner has to succeed upon this. We see exactly all that passed there 29th March, 1869. The meeting was a curious one, and the incumbent presiding at it became perplexed by what took place, and was unsettled a little as to what to judge and do. Six, at the meeting, voted for Baker (if we include himself); three voted for Davidson. Baker was qualified to vote, or to be elected; so were the three who voted for Davidson. The other five were not holders of pews or sittings, and had no title to pews or sittings, and had no vote. The church is a proprietary one, Shufeldt explains it in his evidence in rebuttal, and has a title. How different it is with Abraham Pickle and the others! As to these, could any of them maintain action against anybody, as for disturbance to their possession thereof, *i. e.*, of any pew or sitting (under the Temporalities' Act)? I think not. The chairman at the election, registered Thomas Cotton as a delegate to the Synod, and Baker as "elected by those who had no right to vote," and Davidson elected by those entitled to vote. (Two delegates were to be elected). No proclamation or declaration of the result was made at the meeting, and none was necessary. The certificate granted to Davidson by the chairman, was so granted upon what he believed to be required by the constitution, article 2, above quoted. This article is said by defendant to be contrary to 22 Vic., cap. 139, and, therefore, illegal. But this must not control absolutely: it is to be taken with the 19 and 20 Vic., cap. 141; following the 22 Vic., is the constitution of the Synod, and these three taken together control. The Temporalities' Act, 14 and 15 Vict., cap. 176, has also to be considered to a certain extent, and it makes against defendant and his voters in a way, *e. g.*,

as settling what is meant by holding a pew or sitting; the 2nd section of this Act enacts as follows: "That all pew holders in churches or chapels whatever, holding the same by purchase or lease, and all persons holding sittings therein by the same being let to them * * * after the passing of this Act, by the corporation of such church or chapel, *and* holding a certificate from such corporation of such sitting, shall form a vestry, &c." It is said, too, with some force, that the 31 Vict. has acknowledged the validity of the constitution of the Synod of Montreal, and so it has in enacting as follows: "Sec. 2. The said Incorporated Synod shall have power from time to time to amend, repeal or alter the present constitution, canons, rules and regulations of the aforesaid Synod, &c., * * * but until so amended, repealed or altered, the constitution, canons, rules and regulations of the said Synod *presently* subsisting, and in force, shall be and continue to be the constitution, canons, rules and regulations of the corporation aforesaid created by this Act." I think the constitution valid and binding. The act of the public officer with his testimony, and the other evidence of record, that is, in favour of petitioner, is stronger than the evidence for defendant, and makes a good case for petitioner, whose petition is, therefore, maintained; the defendant is declared guilty of the usurpation charged against him by Davidson and must be ousted; the petitioner, Davidson, is declared to have been duly elected and entitled to his seat as delegate for Christ Church aforesaid; the Synod's proceedings against Davidson, complained of, were unreasonable at the time they took place, and were and are illegal, and are overruled, and order must go to the Synod to admit the petitioner, Davidson, as a lay delegate from Christ Curch, Sweetsburg, and reinsert his name as such, in place of the defendant, Baker's, in the roll of delegates; the whole with costs against defendant. (14 *J.*, p. 165, et 2 *R. L.*, p. 189)

C. P. DAVIDSON, for petitioner.

STRACHAN BETHUNE, Q. C., counsel.

CARTER and HATTON, for defendant.

BANKS.—TRANSFER OF SHARES.—WILLS.

COURT OF QUEEN'S BENCH, IN APPEAL,

Montreal, 4th March, 1870.

Coram DRUMMOND, J., BADGLEY, J., MONK, J., POLETTE, J. *ad hoc.*

THE BANK OF MONTREAL, defendants in the Court below, appellants, *and* WILLIAM-GORDON HENDERSON *et al.*, plaintiffs in the Court below, respondents.

A testatrix, by will, made a bequest in terms following: "And "whereas I now have £2,000 stock in the Bank of Montreal, I give and "bequeath £1,500 thereof to my said sister Jemima Ermatinger, £1,000 "whereof are to become, immediately upon my decease, payable, "assignable or transferable to my said sister by my executors herein-"after named, but it is my will that the interest or dividends which "may accrue and be paid from and out of £500 of my said stock so "bequeathed to my said sister shall be paid by my said executors to "my husband, Dr. Garrett, so long as he shall live, and that the "principal of the said £500, part of the said £1,500 so *bequeathed* to my "said sister, shall not be *payable* or *transferable* to my said sister or her "heirs or legatees *until after* the decease of my said husband. But that, "upon the decease of my said husband, the said capital stock of £500, "part of the said £1,500 so bequeathed to my said sister, shall "immediately thereafter become payable, assignable and transferable "to any person or persons to whom she may have bequeathed the "same, and until the death of my said husband shall continue vested "in the name and under the control of my said executors." And modified the same, by her codicil, as follows: "I have seen fit to "cancel and make void, and do hereby cancel, annul and revoke the "said legacy of £1,000 so made to my said sister Jemima in and by my "said last will and testament, and in lieu and place thereof I do hereby "*give and bequeath* unto my said sister Jemima, to and for *her own use* "*and at her own disposal*, the sum of £500 currency, and I hereby further "will and bequeath the remaining sum of £500 currency unto my said "husband, the said George Garrett, in trust for his daugh ter Ann It is "also my will and desire that the *interest* and *revenues* arising from and "out of the said two legacies of £500 each, shall be received and "enjoyed by my said husband during his natural life, and the principal "at his death only to be paid to the said Jemima Ermatinger and Ann "Garrett respectively, as hereinbefore bequeathed. And I do by these "presents confirm my said last will and testament in every other "respect, declaring these presents to be a codicil thereto, and the same "together to be my last will and testament, and as such I do hereby "publish and declare the same."

Held: 1. Under the terms of the will and codicil the shares of bank stock were so bequeathed as, at the death of the testatrix, to become absolutely and unconditionally vested in Jemima Ermatinger.

2. Jemima Ermatinger dying before Dr. Garrett, the *usufruitier*, and by will, after several specific legacies, leaving the residue of her estate to certain legatees, the said shares formed part of such residue.

3. Any party having acquired transmission of the interest in any share of the capital stock of the Bank of Montreal, can transfer or sell such interest by notarial transfer or in any other lawful way; but transfers in the books of the bank must be made according to sections 16 and 17 of the Act of 1856, 19 Vic., ch. 76, amending the Act of incorporation.

4. Any transferee, by notarial transfer or any other lawful means, of the interest in any share of such stock, may make the declaration in writing, mentioned in the 17th section of said Act, and comply with the formalities therein prescribed, and thereupon shall be entitled to have his name duly recorded in the register of shareholders in lieu of the original shareholder from whom the share was transmitted.

This action was brought by William-Gordon Henderson, of Montreal, and William Ermatinger, in his capacity of curator to the vacant estate and succession of Charles-Oakes Ermatinger, deceased, in his lifetime of Montreal. The declaration alleged that there are now, and have been, for a long time, twenty shares of the capital stock of the Bank of Montreal, of the par value of $4,000, standing in the name of the estate of Anna-Maria Ermatinger, deceased, in her lifetime of Montreal, wife of George Garrett, of the same place, now deceased; that, on the 21st of December, 1830, Anna-Maria Ermatinger, being possessed, in her own right, of twenty shares of the capital stock of the defendants, at Montreal, made her last will and testament and, thereby, bequeathed to Jemima Ermatinger £1,500 of stock in said bank, including the said twenty shares of which £1,000 were payable immediately after her decease, and £500 payable to her after the death of George Garrett, if Jemima Ermatinger should be then living, and, if not then living, then to whomsoever Jemima Ermatinger should appoint by her last will, the dividends meanwhile of the said £500 to her husband, George Garrett, during his lifetime; that, on the 3rd of October, 1834, by a codicil of that date, Anna-Maria Ermatinger reduced the legacy of £1,000, to Jemima Ermatinger, to £500, and gave the usufruct to her husband, George Garrett, during his life; that Anna-Maria Ermatinger departed this life on or about the 28th of October, 1836; that probate of the said will and codicil was duly made on the 8th of June, 1838; that, on the 23rd of March, 1839, Jemima Ermatinger made her last will and testament, by which she willed and bequeathed to her nieces, Anna-Maria Ermatinger and Jane Ermatinger, £200 each; to her nephew, Frederick-William-Ermatinger Cameron, £2,000, if he attained his majority, failing which, the said bequest went to Anna and Jane Ermatinger; to Elizabeth Wickstead, wife of Donald McKercher, £20, to the Montreal Orphan Asylum, £12; and to Charles Ermatinger, to wit, the said Charles-Oakes Ermatinger, the said William Ermatinger, James Ermatinger, Anna and Jane Ermatinger, her nephews and nieces, the residue of her estate; that Jemima Ermatinger departed this life in 1840; that the said several legatees accepted the said legacies, and the said F.-W.-E. Cameron attained his majority before the dates hereinafter mentioned; that, at Montreal, in the late Court of King's Bench, in a

cause, bearing the number 110, wherein Thomas-Cochrane Cameron (the father of Frederick-W.-E. Cameron) was plaintiff, and Charles-Oakes Ermatinger was defendant, judgment was rendered against the defendant, individually as well as in other capacities, on the 20th of February, 1841, for £4,000, and interest, from the 1st of June, 1837, which judgment has never been paid: that Charles-Oakes Ermatinger departed this life, without heirs of his body and without having been married, on the 9th of January, 1857, intestate. The declaration then set up a variety of transfers from four of the legatees (excepting Charles-O. Ermatinger,) to F.-W.-E. Cameron, of their interest in eight of the said twenty shares of bank stock, and, finally, a transfer to respondent; that William Ermatinger was appointed curator to the vacant estate and succession of Charles-Oakes Ermatinger, and accepted of the said office on the 11th of April last; that George Garrett departed this life on the 10th of May, 1864, when the said ten shares of capital stock in the said bank became absolutely vested in the parties then legally entitled to them, under the will and codicil of Anna-Maria Ermatinger, wife of George Garrett; that, by reason of the premises and by law, William-Gordon Henderson is entitled to four-fifths of the said ten shares, and William Ermatinger to one-fifth; that, on the 13th November, 1868, William-Gordon Henderson and William Ermatinger fyled a declaration, in writing, of transmission with defendant, duly signed and acknowledged, according to law, together with all the documents above referred to necessary to substantiate the essential averments in said declaration, which declaration contained, in effect, the above averments, and distinctly stated the manner in which, and the parties to whom, the transmission of the interest in the said ten shares of said bank had been made; that, thereupon, William-Gordon Henderson and William Ermatinger, in his said "capacity, were entitled to have their names duly "recorded in the register of the shareholders in said bank, "in lieu of the name of the estate of Anna-Maria Ermatinger, "to wit, William-Gordon Henderson as holder of four-fifths "or eight of said ten shares, and William Ermatinger as holder "of one-fifth or two of said ten shares, together with all "interests and dividends accrued thereon since the death of "George Garrett on the 10th of May, 1864." The conclusions were that it be adjudged that the said ten shares of bank stock standing in the name of the estate of Anna-Maria Ermatinger belong to plaintiffs in the proportion of four-fifths or eight shares to William-Gordon Henderson, and one-fifth or two of said shares to William Ermatinger, in his capacity of curator to the vacant estate of Charles-O. Ermatinger, and

defendants be ordered to record in the register of the shareholders, in lieu of the name of the estate of Anna-Maria Ermatinger, the names of plaintiffs, as holders of the said ten shares, to wit, William-Gordon Henderson, as holder of four-fifths or eight of said ten shares, and William Ermatinger of one-fifth or two of said ten shares, with all interests and dividends accrued thereon since the death of George Garrett on the 10th of May, 1864, and that defendant be ordered to account for and pay over to plaintiffs, in their capacities and in said proportions, all interests and dividends accrued on said ten shares since the death of Garrett. The appellants pleaded a peremptory exception, by which, after admitting the making of the wills and the deaths of Mrs Garrett and Jemima Ermatinger, Mrs Garrett's ownership, in her own right, of twenty (part of forty) shares of appellant's capital stock, the death of Charles-Oakes Ermatinger, a bachelor and intestate, the signification to appellants of the several notarial deeds mentioned in the declaration, the death, in Ireland, of Garrett, on the 10th of May, 1864, and the respondents' delivery to appellants of a declaration of transmission, claiming, in the proportions aforesaid, ten of the twenty shares belonging to Mrs Garrett's estate, appellants alleged, in substance, that, at her death, on the 28th of October, 1836, Mrs Garrett owned, in her own right, forty shares of the par value of £50 each, of appellants' capital stock, which forty shares she, by her will, bequeathed as follows: "And whereas I now have £2,000 stock in the Bank of Montreal, I give and bequeath £1,500 thereof to my sister Jemima Ermatinger, £1,000 whereof are to become immediately on my decease payable, assignable or transferable to my said sister, by my executors hereinafter named; but, it is my will that the interest or dividends which may accrue and be paid, from and out of £500 of the said stock so bequeathed to my sister shall be paid by my executors to my husband Dr Garrett, so long as he shall live, and that the principal of the said £500, part of the £1,500 so bequeathed to my sister, shall not be payable or transferable to my sister, or her heirs or legatees until after the death of my husband: but that, upon the decease of my husband, the said capital or stock of £500, part of the £1,500 so bequeathed to my sister, shall immediately thereafter become payable, assignable or transferable to my sister, if she be then living, or, if she be not then living, shall be payable or assignable or transferable to any person or persons to whom she may have bequeathed the same, and until the death of my husband shall continue vested in the name and under the control of my executors. And, as to the remaining £500 of my stock in the Bank of Montreal, I give and bequeath the same to Isabella Garrett,

youngest daughter of my husband"; that, by her codicil, dated 3rd of October, 1834, Mrs Garrett modified the above portion of her will as follows: "I have seen fit to cancel and make void, and I do hereby cancel, annul and revoke the legacy of £1,000 so made to my sister Jemima. And, in lieu and place thereof, I do hereby give and bequeath unto her, to and for her own use and at her own disposal, the sum of £500, and I further will and bequeath the remaining sum of £500 unto my husband, George Garrett, in trust for his daughter Ann. It is also my will and desire that the interest and revenue arising from and out of the said two legacies of £500 each shall be received and enjoyed by my husband, during his natural life, and the principal, at his death only, to be paid to Jemima Ermatinger and Ann Garrett, as hereinbefore bequeathed"; that by her will, as modified by her codicil, Mrs Garrett's forty shares of appellants' capital stock were bequeathed as follows: Ten thereof, equal, at par value, to £500, to her sister Jemima Ermatinger, the same to be transferable to her immediately after the death of the testatrix; ten others thereof, of like par value, to Jemima Ermatinger, but not to be transferable to her until after the death of Dr Garrett, to whom the dividends were, in the meantime, to be paid; and then, if Jemima Ermatinger should not be then living, to be transferable to whomsoever she, Jemima, should, *by will*, have bequeathed the same; ten others thereof to Isabella Garrett; and the remaining ten to Dr Garrett, in trust for his daughter Ann Garrett, but not to be transferable to her until after the death of her father, to whom, in the meanwhile, the dividends were to be paid; that of the first ten and ten (together twenty) shares, ten were claimed, in the aforesaid proportions, by respondents, and the remaining ten were claimed in another and similar action, then pending in the court below, by Henry Hogan and another, against appellants; that, by Jemima Ermatinger's will made on the 23rd of May, 1839, long after the death of Mrs Garrett, no special bequest of the shares in question was made, but the residue of her estate was by her bequeathed to her nephews and nieces, Charles-Oakes, William, James, Anna and Jane Ermatinger, and that the testatrix died in 1840; that the residue of Mrs Garrett's estate was, by her will, bequeathed as follows: "*And all the rest and residue of my estate and property, of whatsoever description, and wheresoever situate, I give and bequeath to my brother, Charles-Oakes Ermatinger*," to wit, to Charles-Oakes Ermatinger, *the elder*, father of the aforesaid five residuary legatees of Jemima Ermatinger, and also father of Jemima Ermatinger, *the younger*, mother of Frederic-William-Ermatinger

Cameron, named in the proceedings; that Charles-Oakes Ermatinger, the elder, died before his sister, Mrs Garrett, in the year 1833; and that, as Mrs Garrett had not, at the time of her death (1836), either by her will or by any codicil thereto, made any other or further disposition of the residue of her estate, the said residue, with the said twenty shares of the appellants' capital stock as part thereof, by law devolved to her heirs-at-law, and not either to her sister Jemima Ermatinger, or, as part of Jemima's residuary estate, to Jemima's before-named five residuary legatees, as claimed by respondents; that, inasmuch as the said twenty shares were not specifically disposed of by the will of Jemima Ermatinger, and did not, at her death, form part of the residue of her estate, her said five residuary legatees never, under her will, derived any legal right, title or interest to or in the said shares; and, consequently, could not and did not legally convey them, or any portion of them, to F.-W.-E. Cameron, as by the respondents' declaration, it was alleged four out of the five did, by the several notarial deeds therein cited; that, when F.-W.-E. Cameron assumed, by the notarial deed of the 23rd of November, 1861, the right of conveying ten of the said shares to William Ermatinger, he (Cameron) had no legal right, title or interest to or in the said shares. And, further, in reference, more particularly to respondents' claim to the "interest and dividends" accrued from and after the death of Dr Garrett, on the 10th of May, 1864, appellants alleged in substance: that no "interest" was ever payable on shares of their capital stock, but that "dividends" of the profits arising from their capital stock were declared by appellants' directors half-yearly (*see charter, 19 Vict., ch. 76, sec. 11*), on or about the last days of April and October, in each year, to be payable at the bank, on and after the subsequent first days of June and December; that, as to the first of the said dividends that became payable after the death of Dr Garrett, the same was declared payable *before* his death, to wit, on or about the 30th (afterwards admitted to have been on the 20th) of April preceding that event, and was so declared to be payable on the first day of June then next, and, when so declared, the dividend on the shares in question became, immediately on and from the date of its declarations, absolutely vested in Dr Garrett, and his legal representatives and assigns, and that, shortly after the 1st of June (1864), when it became payable, appellants, being then ignorant of the death of Dr Garrett, remitted the said dividend (as they had, in the ordinary course, remitted the previous ones) to him in Ireland, where it was received by his executors. And, lastly, appellants alleged that they had no appreciable pecuniary or other interest in the

matter in question, save that of seeing that the shares of their capital stock should not be either transmitted or transferred to any but a person or party legally entitled to such shares; and that, by reason of the premises set forth, appellants were justified in their refusal to admit the claim made by respondents' declaration of transmission to the ten shares in question. The conclusions of appellants' exception were: for the dismissal of the action, or, if the action should be sustained, that respondents should be declared to be not legally entitled to the dividend that became payable on the 1st of June, 1864, but only to the subsequent dividends, and that from such subsequent dividends appellants should be given power to retain their costs.

The judgment of the court below (MONDELET, J.) was rendered on the 30th of April, 1869, as follows: "Considering that plaintiffs, William-Gordon Henderson (in his own name) and William O'Brien (in his said capacity) have a right to, as belonging to them, in the following proportion, to wit, ten shares of the bank stock standing in the Bank of Montreal in the name of the estate of Anna-Maria Ermatinger, in the proportion of four-fifths or eight of the said shares to William-Gordon Henderson, and one-fifth or two of the said shares to William O'Brien, in his said capacity: considering that plaintiffs are entitled to obtain from this court an order that defendants do record in the register of the shareholders of the Bank of Montreal the names of plaintiffs, as holders of the said ten shares, in lieu of the estate of Anna-Maria Ermatinger, in the following proportions, to wit, William-Gordon Henderson as holder of four-fifths or eight of the said ten shares, with all interests and dividends accrued thereon since the death of George Garrett on the 10th of May, 1864; and William O'Brien, in his said capacity of curator to the vacant estate of Charles-Oakes Ermatinger, as holder of one-fifth or two of the said ten shares, with all interests and dividends accrued thereon since the death of George Garrett on the said 10th of May, 1864; considering that defendants are bound to account for and pay over to plaintiffs, William-Gordon Henderson, in his own name, and to William O'Brien, in his said capacity, and in the aforesaid proportions, all interests and dividends accrued on the said ten shares since the death of George Garrett on the 10th of May, 1864; considering that plaintiffs have proved the material allegations of their declaration; considering that defendants are altogether unfounded in law and in fact in the allegations of their plea; this court doth dismiss the said plea; it is therefore ordered and adjudged, by this court, and it is declared that the said ten shares of bank stock standing in the name of the estate

of Anna-Maria Ermatinger, do belong to plaintiffs, in the proportion of four-fifths or eight of the said shares to William-Gordon Henderson, and one-fifth or two of the said shares to William O'Brien, in his said capacity of curator to the vacant estate and succession of Charles-Oakes Ermatinger; it is further ordered that defendants do forthwith record in the register of shareholders of the Bank of Montreal the names of plaintiffs as holders of the said ten shares, in lieu of the estate of Anna-Maria Ermatinger, in the following proportions, to wit, William-Gordon Henderson as holder of four-fifths or eight of the ten shares, with all interests and dividends accrued thereon since the death, on the 10th of May, 1864, of George Garrett, and William O'Brien, in his capacity of curator to the vacant estate of Charles-Oakes Ermatinger, as holder of one-fifth or two of the said ten shares, with all interests and dividends accrued thereon since the death of George Garrett; it is finally ordered that defendants do forthwith account for and pay over to plaintiffs, in their said names and capacities respectively, and in the said proportions, all interests and dividends accrued on the said ten shares since the death, on the 10th of May, 1864, of George Garrett: this court doth condemn defendants to the costs of this action."

GRIFFIN, Q.C., for appellants, cited the notes of Mr. Justice MONDELET as follows: "At the argument, it has been urged, by the bank, that the transmissions or transfers have not been according to the conditions and rules of the bank. Whether this be true or not is of no import. The banks are at liberty to make their entries in their registers, such as they think best. But parties who assign or transfer to others their shares and rights in bank stock, have a right to effect such transfer in the way they consider the most available, provided it be not done in an illegal way, and such is the case here. I, therefore, am of opinion that plaintiffs are entitled to a judgment in their favor, according to the conclusions of their declaration." Reading this judgment by the light of the remarks of the court below, it becomes manifest that the court below considered the questions at issue between the parties to be resolved into one of whether "the transmissions or transfers" of the shares claimed by respondents had or had not been made according to the conditions and rules of the bank," whereas the main questions submitted to the court below, alike by the written pleadings and orally, at the argument of the case on its merits, were: 1st Whether, by Mrs Garrett's will and codicil, the shares in question were by her so bequeathed as, at her death, to become and be absolutely and unconditionally vested in her sister, Jemima Ermatinger? If they were so bequeathed they must (but if they were

not, they *could not)* have subsequently devolved to the residuary legatees of Jemima Ermatinger, under the general bequest of her residuary estate contained in her will. 2nd Whether the restriction contained in Mrs Garrett's codicil (to the effect that, in case the death of her sister, Jemima Ermatinger, should precede the death of Dr Garrett, the shares should, at his death, be transferred to whomsoever Jemima Ermatinger should, by will, have bequeathed them) did not limit the bequest to Jemima Ermatinger to a life interest, in succession to that of Dr Garrett, in the shares, with the addition, however, of power to bequeath them specially to whomsoever she pleased, such bequest, of course, not to take effect, unless Jemima Ermatinger should die before Dr Garrett? And, if so, whether Jemima Ermatinger's general bequest to her residuary legatees could be held to be an exercise of the power, bequeathed to her by Mrs. Garrett, to bequeath the shares to whomsoever she chose? Or, in other words, from the death of Mrs Garrett to her own death, had Jemima Ermatinger, under Mrs Garrett's will and codicil, any other power over the shares in question than the power of bequeathing them to whomsoever she pleased, subject to Dr Garrett's life interest in them? and 3rd If, up to the moment of her death, Jemima Ermatinger had no other power, under Mrs Garrett's will and codicil, over the shares in question, than that of bequeathing them to whomsoever she pleased, did she, by her general bequest of the residue of her estate to her five residuary legatees, exercise that power? She, certainly, did not make any *specific* bequest of them. The judgment of the court below did not decide these questions, and, therefore, if submitted to, it will not afford to appellants any protection against the heirs-at-law of Mrs Garrett, if those heirs should be (as the appellants have unquestionable reason to believe they are) other than Jemima Ermatinger's five residuary legatees, and should hereafter see fit to claim the shares from the appellants, hence this appeal. But, even if it should be held by this court that the five residuary legatees of Jemima Ermatinger became, at her death and under her will, absolutely entitled to the ten shares of stock claimed by respondents as being vested with the rights of those residuary legatees, there remain the further questions raised by appellants' exception, and submitted to the court below at the argument of the case on its merits, but of which, apparently, the court below took no notice, namely whether the several notarial deeds, under which respondents claim, were sufficient legal conveyances of eight out of the ten shares: 1st From four out of the five residuary legatees of Jemima Ermatinger to F.-W.-E. Cameron, and, next, from the

latter to Henry Hogan, one of the respondents. The appellants contended and contend that the deed of the 1st of December, 1859, being manifestly intended to be a "settlement between a minor become of age and his tutor," and "relating to the administration and account of the latter," and not being, nor having been "preceded by a detailed account and the delivery of vouchers in support thereof," as required by article 311 of the Civil Code, and the authorities on which that article is based, is a nullity; and that, moreover, both it and the other notarial deeds, adduced in support of respondents' pretensions, are too loose and vague in their language, and too defective in the essential requirements of such documents, to admit of their application to any of the shares of appellants' capital stock belonging to the estate of the late Mrs Garrett. The appellants would further submit to this court, as they did to the court below, an additional objection, more particularly applicable to the deed of the 31st of October, 1868, under which William-Gordon Henderson, one of the respondents, claims that Alexander Henderson *transferred* to him the ten shares in question. The 16th section of appellants' charter (19 Vic., cap. 76) declares: "Every share of the capital "stock shall be held to be personal estate, and be transmissible "accordingly, and also, shall be transferable, at the bank, ac-"cording to the form of schedule A, annexed to this Act; but "no transfer shall be valid and effectual unless it be made and "registered in a book to be kept at the bank for that purpose, "and be therein accepted by the party to whom the transfer "shall be made, or his lawful attorney; nor shall any transfer be "made or allowed until the transferring party shall have pre-"viously discharged all his debts and liabilities to the bank "exceeding in amount the value of his remaining shares, if "any, unless with the consent of the directors." The 17th section provides that: "The transmission of the interest in any "share of the capital stock, in consequence of the death, "bankruptcy or insolvency of a shareholder, or of the mar-"riage of a female shareholder, or by any other lawful means "than an ordinary transfer under the preceding section, shall "be authenticated by a declaration in writing, made and "signed by the party claiming the transmission, or his lawful "attorney, or in such other manner as the directors shall "require; every such declaration shall distinctly state the "manner in which, and the party to whom the transmission "has been made; and shall be, by the party making and sign-"ing the same, acknowledged before, &c.: and when so signed "and acknowledged shall be left with the cashier, transfer-"clerk or other officer of, and at the bank in the city of "Montreal, together with such original or officially authenti-

" cated documents or extracts, as shall be necessary to substan-
" tiate the essential averments in the declaration ; and there-
" upon, the party claiming and proving the transmission shall
" be entitled to have his name duly recorded in the register
" of shareholders, in lieu of the name of the original share-
" holder from whom the share was transmitted, &c." Now, Mrs Garrett's will directed that those of her shares of appellants' capital stock, the dividends arising from which she had bequeathed to her husband, Dr Garrett, during his life, should " continue vested in the name and under the control of her executors " until his death, when they would become transferable to whomsoever should be then legally entitled to them. From the time of her death to the present day the shares have accordingly remained in the register of appellants' shareholders as belonging to her estate, and they were not susceptible of either transfer or transmission until after the death of Dr Garrett, on the 10th of May, 1864, at which date, according to respondents' pretended claim of title, Alexander Henderson became entitled, under the deed from Mrs Thomas to him of the 15th of July, 1863, to the ten shares now claimed by respondents. If so, he should have claimed them by a *declaration of transmission*, under the above-quoted 17th section of the appellants' charter, when, if his claim had been admitted, appellants would have substituted his name in their register of shareholders in lieu of the name of the estate of Mrs Garrett ; and he could then, if he had previously discharged all his debts and liabilities, if any, to the bank, in appellants' transfer-book, at the bank in the city of Montreal, *and no where else, and in no other manner than in the form prescribed*, have legally transferred them to whomsoever he pleased. Instead of so doing, however, he, by the notarial deed of the 31st of October, 1868, assumed to transfer the ten shares in question to the present claimant of eight of them, namely to William-Gordon Henderson, one of the respondents. The appellants submit that this notarial transfer should have been held by the court below to have been invalid and ineffectual, under the foregoing provisions of appellants' charter, and, consequently, should have dismissed the action in so far as it respected Henderson's claim to the eight out of the said ten shares, even if all his other pretensions had been found sustainable.

MORRIS, J. L., for the respondents: The first pretension raised by appellants in the pleas and at argument was that the twenty shares did not fall into the residue of Jemima Ermatinger's estate, and, having made no special bequest of the shares, that they did not devolve to her five residuary legatees under her will. A glance at the terms of the will of

Anna-Maria Ermatinger will shew that this pretension is untenable. The words of the will are: "I give and bequeath "£1,500 to my sister Jemima Ermatinger, £1,000 whereof "are to become, immediately upon my decease, payable, "assignable or transferable to my said sister by my executors "hereinafter named; but it is my will that the int rest or "dividends which may accrue and be paid from and out of "£500 of my said stock so bequeathed to my said sister shall "be paid by my said executors to my husband, Dr Garrett, so "long as he shall live, and that the principal of the said £500, "part of the said £1,500, so *bequeathed* to my said sister, shall "not be *payable* or *transferable* to my said sister or her heirs "or legatees *until after* the decease of my said husband. But "that upon the decease of my said husband, her said capital "stock of £500, part of the said £1,500 so bequeathed to my "said sister, shall immediately thereafter become payable, "assignable and transferable to my said sister if she be then "living; or, if she be not then living, shall be payable, assign-"able or transferable to any person or persons to whom she "may have bequeathed the same, and until the death of my "said husband shall continue vested in the name and under "the control of my said executors." By a codicil to the will the legacy of £1,000, so immediately payable to Jemima Ermatinger after the death of the testatrix, was reduced to £500, the interest of which to be paid to Dr Garrett during his life, in the words following: "I have seen fit to cancel and make "void, and do hereby cancel, annul and revoke the said legacy "of £1,000 so made to my said sister Jemima in and by my "said last will and testament, and in lieu and place thereof I "do hereby *give and bequeath* unto my sister Jemima, to and "for *her own use and at her own disposal*, the sum of £500, "and I hereby further will and bequeath the remaining sum "of £500 unto my husband, George Garrett, in trust for "his daughter Ann. It is also my will and desire that the "*interest* and *revenues* arising from and out of the said two "legacies of £500 each, shall be received and enjoyed by my "husband during his natural life, and the principal, at his "death only, to be paid to Jemima Ermatinger and Ann Gar-"rett respectively, as hereinbefore bequeathed. And I do, by "these presents, confirm my last will and testament in every "other respect, declaring these presents to be a codicil there-"to, and the same, together, to be my last will and testa-"ment, and as such I do hereby publish and declare the "same." The words of the will: "I give and bequeath to my "sister;" "the principal of the said £500 so bequeathed to my "sister;" "if she be not then living [to wit, at the death of "the testatrix] shall be payable, &c., to any person or persons

" to whom she may have bequeathed the same," and the words of the codicil: " I do hereby give and bequeath unto my sister " Jemima, to and for her own use *and at her own disposal,*" all shew that the two sums of £500 each, mentioned in the will and codicil, were absolute bequests to Jemima, subject to a usufruct in favor of Dr Garrett, the testatrix's husband ; the principal during his lifetime to remain under the control of the executors who were charged with seeing that the dividends were regularly paid to Dr Garrett, and after his death to be paid to Jemima Ermatinger, or to whomsoever she might have bequeathed it. It is evident that the testatrix intended to leave the £1,000 to some one. That person cannot have been Dr Garrett, for he was only to get the interest ; it must, therefore, have been Jemima Ermatinger, and to say that the above sum did not form part and parcel of her estate is a very extraordinary pretension on the part of appellants. A vast amount of ingenuity seems to have been expended, on the part of appellants, in drawing a very lengthy plea, all with the view of shewing that the five residuary legatees of Jemima Ermatinger were entitled to no part of the said £1,000, and winding up with the declaration that it belongs to persons unknown. The next pretension of appellants is contained in the following words of their plea: " That, by the will of Anna-Maria " Ermatinger, her twenty shares of defendants' capital stock, " of which the said ten shares formed a part, were declared to " be non-transferable until after the death of her husband, " George Garrett, to whom the dividends, in the meantime, " were bequeathed ; that George Garrett died on or about the " 10th of May, 1864 ; and if, at that date, Alexander Henderson " had any right, title or interest in or to the said ten shares, he " was bound, by the provision in that behalf of the 17th sec- " tion of the defendants' charter [19 Vict., cap. 76], to claim " the transmission to him of the said shares, and to authenti- " cate his claim of transmission by a declaration in writing, " made and signed by him or his lawful attorney, and, after " being duly acknowledged, as required by the said section, " left with the cashier, transfer-clerk or other officer of defen- " dants, at their bank, in the city of Montreal, together with " such original or officially authenticated documents or ex- " tracts as might be necessary to substantiate the essential " averments in such declaration in writing contained, distinct- " ly stating in writing the manner and means in and by which " he, Alexander Henderson, became entitled to the transmis- " sion to him of the said ten shares ; and that, as by the 16th " section of defendants' charter, it was and is required that " every share of their capital stock shall be transferable at " defendants' bank, according to the form prescribed in and

" by the said section, and that no transfer of any share shall " be valid and effectual unless it be made and registered in a " book kept at defendants' bank for that purpose, and be " therein accepted by the party to whom the transfer should " be made, or his lawful attorney, it was not legally compe- " tent to Alexander Henderson, by the notarial *acte* of the " 31st of October, 1868, to transfer and convey to William- " Gordon Henderson, one of the plaintiffs, the said ten shares, " or any of the said ten shares, or any share whatever, of def- " endants' capital stock, and that the said notarial *acte* was " and is, therefore, null, void and of no effect." The appellants then proceed, in their plea, to state that they have no other interest in the matter in question than that of seeing that the shares of their capital stock are neither transmitted nor transferred to any person not legally entitled to such transmission or transfer. They conclude by asking that, if, notwithstanding the premises pleaded, it should be held that plaintiffs were entitled to their conclusions, they [the plaintiffs] be condemned to pay defendants' costs. In answer to these pretensions of appellants, respondents say that they are at a loss to imagine why appellants have come into court with such a plea. They say that they have no other interest than that of seeing that the shares of their capital stock are not transferred to any person not legally entitled to them. Why, then, do they urge grounds which are purely technical? Supposing William-Gordon Henderson legally entitled to these shares, why is his claim resisted? Why brought before the court upon a matter of form? Why is the first judgment not submitted to? The appellants were aware, for a considerable time before plaintiff (William-Gordon Henderson) fyled his declaration of transmission, that he was about to make it, and were frequently consulted about the documents required to make the necessary proof. These documents, which the court will perceive are very numerous, were got together at great expense and trouble. The respondent, all this time, naturally supposed that he was acting in due form and taking the proper course to get possession of his property, the only question raised by the bank being: " Are you the legal owner? The appellants declared they were not satisfied with plaintiff's title, and for the first time, in their plea, raised the argument that, in case the court should be against them on the merits, on the question of title, it should be held that plaintiff had not made his claim in the legal way. That instead of transmission being claimed by him, it should have been done by his *auteur*, and, then, in a way unworthy of a corporation such as the Bank of Montreal, asked that, in case they should fail upon every point, in case all their arguments should be of

no avail, that the party who succeeded should pay *their* costs. If appellants wanted merely to have a judgment confirming the title and to save the costs of litigation, they could have taken the benefit of the 4th section (24 Vic., cap. 91) intituled "An Act to amend the charter of the Bank of Montreal," which allows the directors of the Bank of Montreal, in case they entertain reasonable doubts as to the legality of any claim to any share, dividend or deposit of or in the said bank, to present a declaration and petition to the Superior Court setting forth the facts, and praying for an order or jugdment adjudicating and awarding said shares, dividends or deposits to the party or parties legally entitled to the same, in which case the costs on obtaining such order or judgment will be payable by the party or parties to whom the shares, dividends or deposits are declared legally to belong. In the present case, appellants refused to resort to the inexpensive course pointed out by the said amendment, and having preferred to risk the expense of a contested suit, and to go into appeal, cannot, in reason or justice, expect to be let off the costs occasioned by their own rash acts. The Act 19 Vic., cap. 76, was framed in the interest of the Bank of Montreal, and for their convenience. It in no way altered the common law under which any person has a right to sell his interest in his estate, personal or real, to any other person for valuable consideration. It was not by virtue of the *fiat* contained in the 16th section of said Act that bank stock became personal estate; it was personal estate, and could be sold and transmitted before that Act was passed. The 16th section, by its terms, clearly shows that the Act has reference only to transactions had in relation to actual transfers *in their books*. The words are: "Every share of the capital stock shall be "held to be personal estate, and be transmissible accordingly, "and also, shall be transferable, *at the bank*, according to the "form of schedule A, annexed to this act." The act creates a distinction between "transmissible and transferable." It says: "Every share of the capital stock shall be held to be personal "estate, and be transmissible accordingly, *i. e.*, in the way per-"sonal estate is transmissible by law, but shall be transferable, "*at the bank* according to the form of schedule A." It is only transfers at the bank, in their books, which must be made in the form of schedule A; but who has the right of saying to anybody: "You cannot sell, or discount or transfer, for valuable consideration, your just claims to Bank of Montreal stock, or to anything else? Respondents are confident that the Court of Appeals will never sanction such a doctrine. The transfer under which respondent claimed was also a "lawful means" of transmission within the meaning of the 17th section, and it is per-

mitted under said section, to such a transferee, to make the declaration of transmission. What the Bank of Montreal can and is authorized to say is this, viz., that they will not make any transfer *in their books*, or recognize the right of any party claiming transmission of the interest in any share of their capital stock, in consequence of the death of a shareholder, unless such transmission be authenticated by a declaration in writing, made and signed by the party claiming the transmission, &c. In the present case, respondent (William-Gordon Henderson), claiming the transmission, has conformed himself to the act and made the necessary declaration in writing, duly authenticated, with all authenticated documents necessary to prove the allegations thereof.

DRUMMOND, J., rendering the judgment of the court said: This appeal has arisen out of the following circumstances: There are now, and have been for a long time past, twenty shares of the capital stock of the Bank of Montreal of the par value of $4,000, standing in the name of Anna-Maria Ermatinger, deceased, in her lifetime wife of George Garrett, a retired army surgeon, also deceased. The original plaintiffs, William-Gordon Henderson and William Ermatinger, in his capacity of curator to the vacant estate of Charles-Oakes Ermatinger, having become proprietors, by several titles, of ten of these shares, and having been denied transmission of them, brought their action, in December, 1868, against the bank. Their declaration concludes by praying that the ten shares claimed by them should be declared to belong to them in the proportion of four-fifths or eight shares to William-Gordon Henderson, and one-fifth or two shares to the curators of the vacant estate of Charles-Oakes Ermatinger, and that appellants should be ordered to record the transmission thereof in their register of shareholders, and to pay to them (plaintiffs) all the interests and dividends accrued thereon since the death of George Garrett, which occurred on the 10th of May, 1864. The appellants met this action by a peremptory exception, raising various objections to the right of respondents in the shares claimed by them, which it is unnecessary to specify, as we consider them totally unfounded; while, on the other hand, we are of opinion that the chain of titles under which respondents claim, has been fully proved by admissions; and during the *litispendance* in the court below, William Ermatinger died, and, in his stead, William O'Brien was appointed curator to the vacant estate of Charles-Oakes Ermatinger. The judgment appealed from was pronounced on the 30th of April, 1869. In this judgment we concur; but, before proceeding to confirm it, it is right to allude to an objection urged in argument in the court below, and in the printed fac-

tum fyled here, viz: That the various transfers through which plaintiffs claim are null, because they have not been made in the manner prescribed by the 16th section of the Act 19th Vict., chap. 76. Now that this mode of transfer is requisite for the formal recognition of shareholders, is admitted; but a doctrine enunciated to the court to the effect that the substantial right in the shares of the bank cannot be conveyed otherwise than by a document signed at their counter in Montreal, would not only be contrary to all principles of law, equity and justice, but would have a fearfully depreciatory influence on the stock of that great financial institution. The cause of this action was the refusal, on the part of the bank, to acknowledge respondents as shareholders in the form prescribed by the statute. Its object is to secure to them such recognition. His Honor would add a few words as to costs. The appellants, evidently conscious of the weakness of their objections, claimed that if it should be held by the court that plaintiffs were entitled to their conclusions, they (the plaintiffs) should be condemned to pay costs. This, in any case, would be a *non sequitur*, but it is more surprising that it should appear in this than in any other suit; for had appellants, instead of repelling the claim of respondents, confined themselves to the intimation of doubts as to legality, and availed themselves of the very liberal provision made in their favor by the Act 24th Vic., chap. 91, sec. 4, they would have presented a petition to the Superior Court to remove such doubts, and whatever might have been the result they would have had no costs to pay. But, having preferred boldly to deny respondents' rights, and having dared them to an encounter in the forensic lists, appellants must be mulcted in costs, *la peine du plaideur téméraire.* Therefore, the unanimous opinion of this court is that the judgment of the court below should be, as it is hereby confirmed, with full costs in both courts against appellants. (14 *J.*, p. 169)

F. GRIFFIN, Q. C., for appellants.

RITCHIE, MORRIS and ROSE, for respondents.

JURISDICTION.

CIRCUIT COURT, Montreal, 21st February, 1870.

Coram BEAUDRY, J.

THOMPSON *et al. vs* DESSAINT.

Held: That when an order for goods has been given at Kamouraska to a travelling agent of a mercantile house in Montreal, on the exhibition of samples, and has been afterwards accepted by the Montreal house and the goods forwarded by railway, according to the instructions of the purchaser who paid the freight, the right of action originated at Montreal.

This was a hearing on an *exception déclinatoire*, which alleged that the *cause* of action originated at Kamouraska. The action was brought against defendant, described as residing at Kamouraska, to recover the price of certain goods, alleged in the declaration to have been sold and delivered by plaintiffs at Montreal. The action was instituted at Montreal, and served at defendant's domicile, in Kamouraska. The defendant ordered the goods from a travelling agent of plaintiffs (who carried on business in Montreal), on the exhibition of samples, with instructions from defendant to have the goods forwarded by Grand Trunk Railway to Saint-Pascal Station, near Kamouraska. The order having been accepted by plaintiffs in Montreal, the goods were there packed and delivered to the railway company, who delivered them, at the Saint-Pascal Station, to defendant, who paid the freight thereon.

DOUTRE, Q. C., for defendant, contended that, according to the well settled jurisprudence of our courts, the *cause* of action meant the *whole* cause of action, and that, as a part of the cause of action was the giving of the order at Kamouraska, the suit clearly could not be brought in Montreal. He further contended that the delivery was also at Saint-Pascal, and not at Montreal.

BETHUNE, Q. C., for plaintiffs, argued that, inasmuch as the goods were sent by railway to Saint-Pascal, by defendant's instructions, and that he paid the freight, the delivery of the goods (so far as plaintiffs were concerned) was made at Montreal; in other words, that the delivery to the railway company was, under the circumstances, a delivery to defendant. He further contended, that the jurisprudence invoked had no application to the present case, which was governed by the 34th article of the Code of Procedure, which said nothing about the *cause* of action, but provided for the bringing of the action "before the court of the place where the "*right* of action *originated*." And he then argued that the *right* of action *originated* in the acceptance of the order in Montreal, and the delivery there of the goods, in accordance with such order.

"La Cour, considérant que la vente faite en cette cause l'a été sur l'ordre du défendeur, d'après échantillons à lui montrés, et que les effets vendus au défendeur ont été comptés, pesés et mesurés en la cité de Montréal, où les demandeurs les ont remis aux soins de la compagnie du Grand-Tronc de chemin de fer; vu les articles 1472 et 1474 du Code Civil, et considérant qu'en vertu des dispositions contenues dans ces deux articles, la vente n'a été parfaite qu'après que lesdits effets ont été comptés, pesés et mesurés, et qu'après cette opération le droit d'action a pris naissance, en la cité de Montréal, indé-

pendamment de la livraison, et qu'en conséquence, suivant les dispositions de l'article 34 du Code de Procédure, l'action pouvait être portée devant cette cour; déclare ladite exception mal fondée et la renvoie avec dépens." (14 *J.*, p. 184)

BETHUNE & BETHUNE, for plaintiffs.

DOUTRE, DOUTRE & DOUTRE, for defendants.

JURISDICTION.

CIRCUIT COURT, Montreal, 1st April, 1870.

Coram TORRANCE, J.

JOSEPH *et vir vs* PAQUET.

Held: That where a party in Quebec gave an agent of the plaintiff there an order for goods to be supplied by plaintiffs in Montréal, according to a sample exhibited by the agent, and the order was filled and the goods supplied at Montreal, the right of action arose in Montreal.

PER CURIAM : This case is before the court on an *exception déclinatoire*, alleging that the right of action, C. C. P., art. 34, had not arisen in the district of Montreal, where defendant had been summoned to appear. It appears in evidence that Benjamin, acting as agent of plaintiffs, offered the defendant at Quebec a sample of goods. The defendant agreed to buy, and the plaintiffs at Montreal accepted the terms and delivered the goods to the railroad company, at Montreal, for defendant. It has been decided again and again in England. and also by our Court of Appeals in *Senécal* vs *Chénevert*, 4 *J.*, p. 239; 6 *L C. J.*, p. 46; 12 *D. T. B. C.*, p. 145; 8 *R. J. R. Q.*, pp. 235 et 237, et 19 *R. J. R. Q.*, pp. 96 et 97, that the expression used by the statute, "cause of action," meant the whole cause of cation. Has the Code of Procedure changed the rule by using the words "right of action?" I find that Mr. Justice BEAUDRY, in the case of *Thompson et al.* vs *Dessaint*, *suprà*, p. 114, has decided that defendant could be summoned to answer where the right of action has been perfected. I feel it to be my duty in the same court in a non-appealable case to follow this decision, reserving to myself the right of reviewing the decision in an appealable case, if the case should present itself. Exception dismissed. (14 *J.*, p. 186)

J.-O. JOSEPH, for plaintiffs.

BRUNET & BERTRAND, for defendant.

RESPONSIBILITY OF HUSBAND.

CIRCUIT COURT, Montreal, 18th December, 1869.

Coram TORRANCE, J.

ROCHELEAU *vs* ROCHELEAU *et al.*

Held: That though a husband is not responsible in damages for the *délit* of his wife *commune en biens* with him, unless he has personally participated in the *délit*, yet, if he joins with her in a defence to the action, and the defence is overruled, he will be condemned jointly and severally with her.

TORRANCE, J.: The plaintiff complains that defendant's wife, Mathilde Nadon, with the complicity of defendant, Thomas Rocheleau, assaulted and beat plaintiff and plaintiff's wife. The defendants join in their defence and deny the allegations of the declaration; and defendant, Thomas Rocheleau, says further that, if his wife did assault and beat plaintiff, it was without his complicity, and that he is not responsible for her acts in the circumstances of the case. As to the facts, there is no doubt but that defendant, Mathilde Nadon, assaulted and beat plaintiff's wife, but it was without the participation of defendant, Thomas Rocheleau, or his complicity. The rule of law generally applicable to these cases is that the husband is not responsible for the *délit* of the wife, C. C., art. 1294. But there is an exception where the husband has joined with the wife in the defence. Troplong, vol. 2, *Du Mariage*, n° 922, p, 201, says: " Si le mari intervient au procès intenté à sa femme pour délit, et y défend conjointement avec elle, il doit être condamné, comme commun, aux dépens et dommages et intérêts; c'est ce qui a été jugé dans l'ancienne jurisprudence." *Vide* also authorities there cited.

" The Court, considering that defendant, Mathilde Nadon, did, on or about the 17th July, 1869, assault and beat the wife of plaintiff; considering that defendants, husband and wife, have pleaded jointly to the action of plaintiff; considering that defendant, Thomas Rocheleau, although he did not personally participate in the *délit* of Mathilde Nadon, nevertheless, not having severed in his defence from his wife, must, as *commun en biens*, share her liability; doth overrule the plea of defendants and adjudge and condemn defendants, jointly and severally, to pay and satisfy to plaintiff the sum of ten dollars, for the cause aforesaid, with interest from this day, and costs: and the court doth dismiss plaintiff's action for any greater sum. (14 *J.*, p. 194)

CHAGNON, for plaintiff.

CHAPLEAU, for defendants.

COUPE DE BOIS.—VENTE.

COUR SUPÉRIEURE, Montréal, 19 mai 1869.

Coram BEAUDRY, J.

PAQUETTE DIT LAVALLÉE *vs* DANSEREAU *et ux.*

Jugé: Que la coupe et dépouille d'un demi-arpent de terre à bois de front, sur quatorze arpents de profondeur, vendue en 1813, ne donne pas à l'acquéreur et ses ayants cause la coupe et dépouille à perpétuité du bois sur cet immeuble.

Le défendeur a intenté une action négatoire le 5 juin 1868, dans laquelle il alléguait que, par un acte de vente reçu à Verchères devant P. Vallée, N. P., le 28 décembre 1813, Charles Paquette dit Lavallée avait vendu à Jean-Baptiste Jacques " la coupe et dépouille d'un demi-arpent de terre à bois de front, sur quatorze arpents, plus ou moins, de profondeur," etc., et, après avoir exposé ses droits, par suite de différents contrats, il prétendait que les défendeurs et leurs auteurs ont depuis longtemps abattu et enlevé la coupe et dépouille du bois qui existait sur ledit immeuble lors de la passation de l'acte de 28 décembre 1813, et que les défendeurs ont même, depuis plusieurs années, malgré les défenses du demandeur, coupé, abattu et enlevé des quantités considérables de jeune bois, c'est-à-dire du bois poussé depuis la passation de l'acte du 28 décembre 1813 ; et, partant, que la servitude est anéantie. Le demandeur concluait à l'extinction de cette servitude et à ce que, subsidiairement, dans le cas où il existerait encore sur ladite terre du bois qui s'y trouvait lors de l'établissement de cette coupe de bois, et que les défendeurs auraient le droit d'enlever, il fut, par experts, procédé à constater et marquer le nombre d'arbres que les défendeurs ont encore le droit de couper et d'enlever, et que, sur leur rapport, les défendeurs fussent condamnés, sous tel délai qu'il plairait à la cour de fixer, de couper et enlever les arbres en question, et, ce délai expiré, la servitude éteinte. Les défendeurs ont contesté cette action, et ont prétendu que leur droit de coupe de bois n'est pas limité à la coupe et dépouille pour une fois du bois en question, mais qu'ils ont toujours le droit d'en couper, tant qu'il y en aurait et qu'il y en pousserait.

" La Cour, considérant que les défendeurs ne pouvaient réclamer la coupe et dépouille à perpétuité du bois sur l'immeuble décrit en la déclaration du demandeur en premier lieu, mais qu'ils ont droit seulement de couper les arbres qui existaient lors de l'acte de vente consenti devant P. Vallée et confrère, notaires, le 28 décembre 1813, sur ledit immeuble ; et

considérant que le demandeur a droit de demander qu'il soit fixé une époque et limite pour l'exercice de ce droit : Ordonne, avant faire droit, que, par experts à être nommés conformément aux dispositions du code de procédure, le 27 mai courant, cour tenante, il soit procédé, les parties présentes ou dûment appelées, à visiter les arbres qui se trouvent sur ledit immeuble, et que ceux qui seront par lesdits experts jugés avoir existé lors de la passation du susdit acte de vente, soient mesurés dans leur circonférence, numérotés au pied d'iceux et décrits suivant l'espèce et par ordre de numéros dans le rapport qui en sera fait par les experts, le ou avant le dix-sept septembre prochain, pour là et alors être ordonné ce que de droit, dépens réservés (1). (14 *J.*, p. 195)

DORION, DORION et GEOFFRION, avocats du demandeur.

BÉLANGER et DESNOYERS, avocats des défendeurs.

WILLS.—ADULTERINE CHILDREN.

SUPERIOR COURT, Montreal, 28th February, 1870.

Coram TORRANCE, J.

KING *vs* FILIATRAULT *et al.*, *and* TUNSTALL *et al.*, defendants *par reprise d'instance.*

Held: 1st That from and after the passing of 14 Geo. 3, c. 83, a testator had capacity to devise or bequeath without reserve, restriction or limitation.

2nd That from and after the passing of 41 Geo. 3, c. 4, a testator had a right to bequeath in favour of any person or persons whatsoever, without reserve, restriction or limitation.

3rd That a bequest by a testator who died in 1799, in favour of an adulterine bastard, who only had a right to the bequest in 1835, is to be considered as regards its validity relatively to the time at which the right comes into effect.

PER CURIAM : This is a petitory action, brought to obtain possession of the seigniory of Lacolle or Beaujeu, with a demand for rents, issues and profits. The action was instituted in 1864. The plaintiff sets forth his title in three counts. The

(1) Le 30 décembre 1869, le jugement suivant, MACKAY, J., fut rendu sur le rapport des experts : " La Cour homologue le rapport d'experts, pour être " suivi et exécuté selon sa forme et teneur, en conséquence, ordonne et en- " joint aux défendeurs, sous le délai de douze mois à compter de ce jour, de " couper et enlever les 70 arbres mentionnés audit rapport, etc. Et après que " les défendeurs auront ainsi coupé et enlevé les susdits 70 arbres, ou après le " délai expiré, à défaut par eux de ce faire, ladite servitude de coupe et dé- " pouille de bois sera et est, par les présentes, déclarée éteinte et anéantie " etc., les frais de l'expertise divisés entre les parties, chaque partie payant " ses propres frais sur l'action."

first count alleges that Gabriel Christie, in his lifetime a general in his then Majesty's army, was proprietor in possession of Lacolle or de Beaujeu, and died in or about the year 1799, leaving, as his sole heir-at-law, his son Napier Christie, who had, before then, assumed the name of Burton, and was then known as Napier Christie Burton, and took possession of the seigniory; that he made his will dated 20th December, 1834, and codicil dated 23rd December, 1834, whereby he devised his estates to George-Burton Hamilton, William-Henry King and Edme Henry, their heirs and assigns, upon certain trusts (which are set forth) first in favour of Christiana (otherwise Amelia Christie) Harmar, the only child of the testator's natural daughter, Mary Harmar and her issue, and, failing them, then in favour of plaintiff; that the testator died in the year 1835 without issue; that Christiana Harmar died on the 3rd April, 1847, without such issue, and plaintiff then became entitled to the said real estate. The second count sets forth that Gabriel Christie was proprietor in possession of the said seigniory; that he made his will dated 13th May, 1789, whereby, inter alia, he devised his estates to his eldest son, Napier Christie, and the heirs male of his body, and, for default of such issue, to the use of the heirs male of the body of him the testator, and, failing them, to the use of the testator's natural son, James Christie, and the heirs male of his body, and, failing them, there was a similar bequest to Gabriel Plenderleath and the heirs male of his body, to George Plenderleath and the heirs male of his body, to William Plenderleath and the heirs male of his body successively, and, failing them, then to the use of the testator's brother, William Christie, and his heirs forever; that William Christie died about 1794, and James Christie, Gabriel Plenderleath, and George Plenderleath also died in the lifetime of the testator, without issue or heirs. There follows an allegation which raises the chief contestation in this case: "That the will "of Gabriel Christie, as well by the laws of England as by "the laws of Lower Canada, was and is inoperative, null and "void, in so far only as the same relates to James Christie, "Gabriel Plenderleath, George Plenderleath and William "Plenderleath, who were, and each and every of them being, "as plaintiff avers, adulterine bastards, children of Gabriel "Christie, and the offspring of the adulterine intercourse and "co-habitation of Gabriel Christie, had with Rachel Plender-"leath, whilst he, Gabriel Christie, was joined in matrimony "with his wife, Sarah Christie;" that the testator died on the 20th January, 1799, and Napier Christie Burton then became proprietor in possession of the said estates. The second count then recites the will of Napier Christie Burton and concludes

like the first count. The third count sets forth the will of Gabriel Christie; then that William Christie died in 1794; that James Christie, Gabriel Plenderleath and George Plenderleath died without issue, in the lifetime of Gabriel Christie; that Gabriel Christie died on the 20th January, 1799, without heir male, except Napier Christie Burton, and that William Plenderleath died without issue in 1845; that Napier Christie Burton was sole heir-at-law of William Christie, at the time of his death. The third count then recites the will of Napier Christie Burton, and the codicil already referred to, and alleges the deaths of Napier Christie Burton, in 1835, and Christiana Harmar, in 1847, without having married and without having exercised the power of sale given by said will, "and, whereas, "by the events aforesaid, Napier Christie Burton became "entitled, as the sole heir-at-law of William Christie deceased, "to the remainder in fee simple or absolutely to his residuary "real estate; and plaintiff, Henry-John-Styring King, is now "entitled, in fee simple or absolutely, under the will of Napier "Christie Burton, to the estate and property thereby devised "and bequeathed;" that the said fief is comprised in this estate; that the *rentes constituées* of the seigniory, representing *lods et ventes* and casual dues, represent the capital sum of $19,-273.58; the annual rent being $1,156.41, payable 2nd January and 1st July of each year, and *rentes constituées* representing *cens et rentes*, represent the capital sum of $56,628.75, the annual rente being $3,397.72½, payable on the 2nd January and 1st July; that defendants, in 1845, took possession of the seigniory, and have since received and converted to their own use the rents, issues and profits, to plaintiff's damage, of £100,000. The conclusions are the ordinary conclusions of an action *au pétitoire*. The defendants have met the action by several pleas. The first is a *défense au fond en droit* to the whole declaration, alleging, in effect, that the allegations are inconsistent and irreconcilable with one another, the allegations of the first count stating a condition of things which, according to the allegations of the second and third count was not, and did not exist, and the second count alleging nullities of substitutions, which substitutions the third count admits the validity of. The second plea is a *défense en droit* to the second count, and, in effect, takes issue on the proposition of law of plaintiff that a bequest to an adulterine bastard is null and void. The third plea is a *défense en droit* to the third count, as alleging that Napier Christie Burton could be heir of his uncle, living his father. The fourth plea alleges that, by the codicil to the will of Napier Christie Burton, the bequest to plaintiff was conditional, and to take effect only on and after plaintiff taking the name of Christie, and using the arms of

Christie and no other, and that plaintiff had never done so. The fifth plea raised the same objection, and alleged that the taking of the name and using the arms were a condition precedent to plaintiff making his claim, and that he had not fulfilled the condition. The sixth plea, after invoking the wills of Gabriel Christie and Napier Christie Burton, sets forth a deed or transaction between Napier Christie Burton and Sarah Christie, the widow of Gabriel Christie, whereby she renounced in favour of Napier Christie Burton certain claims which she had upon the estate of the testator, and the plea said that Napier Christie Burton held and possessed the said estate, not as heir-at-law of the testator, but as his devisee and under the said transaction, and subject to their terms and words under the substitution and *charge de rendre* set forth in them; that Napier Christie Burton died without an heir male; that William Plenderleath Christie then took the said estate under his father's will, and was in possession until his death in 1845, when he died childless, leaving a will and codicil and bequest in favour of James Tunstall, the ancestor of defendant Tunstall. The seventh and eighth pleas also invoke the deed or transaction of date 8th August, 1800, and the 7th plea specially denies that Gabriel Christie Burton was heir-at-law of William Christie. The ninth plea invokes the prescription of possession in defendants and their *auteurs* of twenty years, and the tenth plea invokes a similar prescription of ten years. The eleventh plea alleges the good faith of defendants, and that they cannot, therefore, be liable for the rents, issues and profits before institution of the action, and alleges *impenses déboursées* to the amount of £5000. The last plea is the general issue. The plaintiff's answers are general, except that he demurs to the fourth and fifth pleas, which invoke the condition in the will of Napier Christie Burton, that plaintiff should take the name and use the arms of Christie. With respect to the proof, there is no difficulty, but important questions of law have been submitted to the judgment of the court. The court would first dispose of the *défense en droit* to the whole declaration, and the three counts thereof, by saying that it is of opinion that the matters set up by this demurrer are rather matters for a preliminary plea or exception *de cumul*, under C. P. C., arts 15 and 120, § 6. The first demurrer of defendants is, therefore, dismissed. On the other hand, the court is of opinion to maintain the demurrer of defendants to the third count of the declaration. The court also dismisses the answers in law of plaintiff to the 4th and 5th pleas, because the answers rather allege matters which are proved by the will than shewn by the pleading demurred to. Reviewing next the remaining pleas of defendants, the

court is of opinion to overrule the pleas which invoke the deed or transaction of the 8th August, 1800, and the pleas of prescription as not proved. The important question remains, upon which plaintiff has laid most stress, and which is raised by the second count of the declaration and by the *défense au fond en droit* to that count: namely whether the bequest made by the will of General Gabriel Christie, in favour of his natural son, William Plenderleath, being an adulterine bastard, born of the illicit intercourse of his father with Rachel Plenderleath, during his marriage with Sarah Christie, was inoperative and null and void. There is no doubt whatever that, by the old law of Lower Canada, at the time of the conquest, in 1759, such a bequest was void, except as to aliments, and the testator and the legatee were alike incapable, the one to bequeath and the other to receive. 7 Pothier, édition de 1778, *Donations Testamentaires*, p. 341; *Idem*, même vol., *Donations Entre-vifs*, p. 449. We have next the important provision of the Quebec Act, so familiar to the bar, 14 Geo. 3, chap. 83, s. 10, in these words: "It shall and may be lawful for every person that is owner of any lands, goods or credits, in his or her lifetime, by deed of sale, gift or otherwise, to devise or bequeath the same at his or her death, by his or her last will and testament, any law, usage or custom heretofore or now prevailing in the Province to the contrary hereof in any wise notwithstanding, &c." Did that clause remove the previous incapacity of a testator to make such a bequest? It is large and unlimited in its expressions. But plaintiff contends that the previous law was a law of public order and morality and could not be repealed, except by language showing that the legislator intended to innovate upon and depart from its wise provisions in the matter of adulterous children. Mailher de Chassat, *Interprétation des Lois*, pp. 197, 200 et 210; Sedgwick, *On Statutory and Constitutional Laws*, pp. 123, 7, 8: Dwarris, *On Statutes*, pp. 514, 519, 532, 533, 563, 604, 621 and 626. The court has always understood that the Act of 1774 took away the incapacity of the testator, and, with all deference to the opinions ably expressed in a different sense, holds to-day to the opinion that the incapacity of the testator was removed in 1774, by the Act in question. We then find this Act in force in 1789, when the testator made the bequest in favour of the adulterous issue of his intercourse with Rachel Plenderleath. We come next to the important question as to the incapacity of the legatee, William Plenderleath, to take, under the will of his father, General Christie. At what date is that capacity or incapacity to exist? Is it at the date of the will of the testator, in 1789, or at the date of the death in 1799, or at the time when William Plenderleath took the substitution, opened

in 1835 by the death of Napier Christie Burton, the legitimate son of his father, General Christie. The question is an important one, as by the Provincial Act of 1801, 41 Geo. 3, cap. 4, the same large terms, which, by the Act of 1774, are applied to the capacity of testators, give a capacity to take to legatees. By the Act of 1801, a testator might bequeath to any person whatever, any law, usage or custom to the contrary notwithstanding. The court would here say, *entre parenthèse*, that it does not think that that Act can in any sense be regarded as retroactive. It is only prospective. With respect to the capacity of legatees to receive, a short rule is held down by the C. C., article 838 : " The capacity to receive by will is considered relatively to the time of the death of the testator; in legacies the effect of which remains suspended after the death of the testator, whether in consequence of a condition, or in the case of a legacy to children not yet born, or of a substitution, this capacity is considered relatively to the time at which the right comes into effect, &c." There is also a case of *Hamilton et al.* vs *Plenderleath Christie* (1), in which the very question now before the court was discussed and a formal opinion expressed by the Court of Appeals (composed of BOWEN, PANET, BÉDARD and GAIRDNER, Justices) at Quebec, on 10th March, 1845. That opinion was criticised at the bar as not a formal judgment of the court, inasmuch as the court, although it expressly enunciated its opinion, did not decide the case on its merits, but merely set aside all proceedings taken in it from the death of the plaintiff, Napier Christie Burton, when the executors of his will (irregularly as the Court of Appeals thought) took up the instance as plaintiffs *par reprise*. It has certainly not of late

(1) Dans les donations entre-vifs l'acte reçoit sa perfection au moment où il est fait, et il faut que le donateur ait alors la capacité de donner et le donataire la capacité de recevoir. Dans les testaments, la capacité du testateur se considère au temps de son testament, et la capacité de recevoir par testament se considère au temps du décès du testateur ; mais lorsqu'il y a substitution, la capacité de recevoir par l'appelé se considère au temps de l'ouverture de la substitution en sa faveur. Sous l'ancien droit français qui était en vigueur en ce pays avant la passation du statut impérial de 1774, 14 Geo. 3, ch. 83, les bâtards adultérins et incestueux étaient capables de donations et legs d'aliments, mais ils étaient incapables de toute autre donation. Par ce statut impérial, l'incapacité de donner fut enlevée quant au testateur, et par le statut provincial de 1801, 41 Geo. 3, ch. 4, les incapacités de la part des bâtards adultérins de recevoir par testament furent aussi enlevées. D'après ces principes, une disposition testamentaire, contenue dans un testament fait en 1789, par laquelle le testateur donne ses biens à son fils légitime et le grève de substitution en faveur de son fils naturel, bâtard adultérin, doit avoir son effet en faveur de ce dernier, si la substitution ne s'est ouverte par le décès du fils légitime, en faveur du bâtard adultérin, qu'après la passation du statut de 1801, qui a enlevé toute incapacité de la part des bâtards adultérins, de recevoir par testament, la capacité de recevoir par l'appelé à une substitution devant se considérer au temps de l'ouverture de la substitution. (*Hamilton et al.* et *Plenderleath*, Cour d'Appel, Québec, mars 1845, infirmant le jugement de la C. B. R., 10 octobre 1839, 2 Rev. de Lég., p. 1, et 2 R. J. R. Q., p. 126)

years been the practice of our courts to pronounce an opinion which has not culminated in a judgment; but the courts of France have frequently put an end to litigation, before it could be closed by a judgment, by letting the parties know, pending the contestation, what the opinion of the court on the merits was. In the case under consideration the judgment appealed from was a judgment of the Court of King's Bench, composed of PYKE, ROLLAND and GALE, Justices, at Montreal, on the 10th October, 1839. This judgment was against the plaintiff, who sought a judgment from the court, declaring that the bequest in favour of William Plenderleath Christie was inoperative, null and void as made in favour of an adulterine bastard. At the present moment, therefore, the matter stands thus: We have the article 838 of the C. C. affirming that the capacity of the legatee in legacies, the effect of which is suspended by a condition or substitution (as in the present case the legacy to William Plenderleath was suspended till 1835), is considered relatively to the time at which the right comes into effect. In the next place, we have the judgment at Montreal, on the 10th October, 1839, and the opinion of the Court of Appeals in the same sense on the 10th March, 1845. It is humbly submitted that the duty of the court now here requires it to follow in the footsteps of the sworn administrators of the law who have already formally adjudged this matter. The opinion of this court is, therefore, that the action of plaintiff should be dismissed.

"The court, considering that the *défense en droit* by defendants firstly pleaded to the action and *demand* of plaintiff alleges matters which should have been pleaded by an exception *de cumul*, or other preliminary plea, and not by a *défense en droit*, doth dismiss the same with costs; considering that Napier Christie Burton was not heir-at-law of his uncle William Chistie, in the lifetime of his father Gabriel Christie, as erroneously alleged by the third count of the declaration of plaintiff, doth maintain the *défense en droit* of defendants to the third count and dismiss the third count, with costs; considering that the answers in law by plaintiff, pleaded to the fourth and fifth pleas of defendants, allege against said pleas matters which are matters of proof, and do not appear by the pleas, doth dismiss the said answers in law with costs: considering that defendants have not proved the pleas invoking the deed of date the 10th August, 1800, namely the pleas by them sixthly, seventhly and eighthly pleaded to the action and *demande* of plaintiff, and have not proved the pleas of prescription of 10 and 20 years respectively, namely the pleas by them ninthly and tenthly pleaded to the action and *demande*, doth dismiss the said several pleas; considering,

further, that, by law and the jurisprudence of the courts of this Province, the testator, Gabriel Christie, had, since the passing, by the Parliament of Great Britain and Ireland, of the Act numbered chapter 83 of the Acts passed in the 14th year of his late Majesty George III, capacity to dispose of his estate and property without reserve, restriction or limitation; considering that, from and after the passing of the Act of the late Province of Lower Canada, numbered chapter 4 of the Acts passed in the 41st year of the reign of his said Majesty, a testator had a right to bequeath in favour of any person or persons whatsoever, all and every his or her lands, goods or credits, without reserve, restriction or limitation; considering that, by law and the jurisprudence of the said late Province of Lower Canada, William Plenderleath Christie had capacity to take the bequest made to him by the will of the testator, Gabriel Christie, at the date of the death of Napier Christie Burton, to wit, in the year 1835, when the substitution in favour of William Plenderleath Christie took effect; doth maintain the *défense en droit* by defendants pleaded to the second count of the declaration of plaintiff, with costs; considering, finally, that plaintiff hath not proved the material allegations of his declaration, doth dismiss the action and *demande*, and also the petition for the nomination of a *séquestre*, of plaintiff, with costs." (14 *J.*, p. 197)

ROSE & RITCHIE, for the plaintiff.

R. LAFLAMME, Q. C., counsel for plaintiff.

MACKAY & AUSTIN, for the defendants.

F. GRIFFIN, Q. C., and A. A. DORION, Q. C., counsel for defendants.

BREF DE PROHIBITION.

COUR SUPÉRIEURE, Saint-Hyacinthe, 22 novembre 1866.

Coram SICOTTE, J.

DUBORD *vs* BOIVIN, percepteur du Revenu de l'Intérieur.

Jugé: 1° Que les deux juges de paix qui ont reçu la plainte et signé le bref d'assignation en vertu de la clause 14 du ch. 18 de la 27 et 28 Victoria, ont seuls juridiction pour juger finalement la cause; qu'un autre juge de paix ne peut s'immiscer dans l'affaire et juger, que si l'un des deux premiers est absent, et que si celui qui est présent consent à ce que cet autre juge de paix siège avec lui, la conviction doit constater que ce troisième juge de paix siège en l'absence de l'un de ces deux premiers magistrats et du consentement de l'autre.

2° Que la conviction doit contenir l'adjudication sur le fait qui constitue la base de la conviction; et que l'énonciation dans la conviction

"*qu'il résulte pleinement de la preuve que le défendeur a vendu sans licence* "*des liqueurs spiritueuses*" n'est pas une adjudication suffisante.

3° Qu'en règle générale, les juges de paix doivent adjuger sur les exceptions qui attaquent leur juridiction ou qui réclament des exemptions, afin de permettre aux Cours Supérieures d'apprécier la justice de ces exceptions.

4° Que l'écrit suivant: "Reçu de M. Dubord trente-quatre piastres "pour payer une licence d'auberge pour laquelle il a obtenu le certificat "du conseil de comté de Bagot en date de ce jour. Saint-Hyacinthe, 13 "juin 1866, Léonard Boivin, Percepteur du Revenu de l'Intérieur," doit protéger le défendeur et l'exempter de l'amende sur une poursuite de vente de boisson sans licence.

5° Que le bref de prohibition, dans l'espèce, a été pris avec raison et doit être maintenu, mais sans frais contre le percepteur du revenu, parce qu'il est un officier public et comme tel représente la Couronne.

En mars 1866, le conseil du comté de Bagot passe un règlement concernant la vente des boissons dans le comté, et statue qu'aucune licence pour tenir un hôtel et détailler des boissons ne sera accordée que sur la production d'un certificat approuvé par le conseil local et celui du comté, et en par l'appliquant payant dix piastres au conseil de comté. Dubord, qui demeure au village d'Acton-Vale, présente au conseil de cette dernière localité, le deux avril, un certificat des électeurs, qui est confirmé par le conseil local le même jour, et le 13 juin suivant le conseil de comté approuve le certificat de Dubord qui paie les dix piastres exigées par le règlement du mois de mars. Mais le conseil local d'Acton-Vale avait, le 16 avril, passé une résolution pour annuler sa résolution du 2 avril approuvant le certificat de Dubord. Le 13 juin, Dubord, muni de tous les documents nécessaires, se présente chez le défendeur pour avoir sa licence, lui paie la somme d'argent exigible, et ce dernier lui donne le reçu mentionné ci-dessus et promet de lui donner sa licence. Le défendeur refuse ensuite de donner la licence à laquelle avait droit Dubord. Quelque temps après Dubord est poursuivi pour avoir vendu sans licence, depuis le 13 juin, des boissons enivrantes; l'assignation est signée par deux juges de paix, Turcot et Malhiot. Dubord plaide à cette poursuite et les juges de paix Turcot et Dufort rendent jugement le 7 septembre 1866 contre Dubord, le condamnant à payer une amende de $50.00 et les frais, et à deux mois d'emprisonnement à défaut de paiement de l'amende et des frais. Dubord se pourvoit contre ce jugement par un *writ de prohibition*.

SICOTTE, J.: Nul doute que le droit de surveillance accordé aux Cours Supérieures sur les autres tribunaux, peut s'exercer au moyen du *writ de prohibition*. Il n'est pas nécessaire pour l'obtenir, de déclarer qu'il n'y a pas d'autre moyen de garantir ses droits ; mais il suffit de se plaindre que les juges de paix n'avaient pas de juridiction, qu'ils ont procédé injustement, oppressivement, ou irrégulièrement, ainsi que

l'enseigne Hawkins : "For proceeding without juridiction, "for proceeding unjustly, oppressively, or irregularly, for "refusing to do justice," ainsi que l'enseigne Paley (122). On peut résumer les moyens invoqués contre la condamnation, de la manière suivante : 1° Le tribunal qui a condamné n'est pas celui désigné par la loi ; par conséquent, pas de juridiction et pas de tribunal. 2° Une condamnation sans conviction d'offense, et, par conséquent, pas de condamnation légale. 3° Pas de vente illégale de boissons, pas d'offence, attendu la prétention d'un droit et la preuve faite de ce droit. 4° Il y a eu irrégularité, faute d'adjuger sur les exceptions invoquées par le défendeur. 5° Il y a eu injustice, oppression. en permettant au percepteur de revenu de se faire juge de la légalité d'un règlement municipal, et de rappeler le permis de vendre qu'il avait donné, comme nul. Sur les deux premiers moyens, voici des règles et des principes applicables, fondés sur la loi, la jur sprudence et l'essence de ce qui constitue la juridiction et les jugements. Tout jugement doit être rendu par les juges que la loi a institués, et qui sont désignés pour constituer le tribunal investi de juridiction sur la matière. Si la loi indique comment l'absence d'un des juges doit être suppléée, cela doit apparaître dans le jugement même, autrement, le jugement paraît avoir été rendu par un autre tribunal que celui que la loi désigne. Cela est de toute justice, car les jugements décident de choses qui intéressent toujours grandement l'honneur, les biens des citoyens. Leur composition est déterminée d'avance par la loi. Les jugements ne sont valables qu'autant qu'ils sont rendus par le tribunal réglé par la loi. Le tribunal désigné et créé par le statut pour juger la matière dont il s'agissait était les deux magistrats devant lesquels la plainte avait été faite et qui avaient signé le bref d'assignation. La clause 14 du chap. 18 des statuts de 1864 veut qu'aucun autre magistrat ne puisse siéger ou prendre part dans l'affaire, excepté si les deux premiers sont absents, ou à raison de l'absence de l'un deux, et, dans ce cas même, avec l'assentiment de l'autre juge de paix, c'est le tribunal spécial, et le seul compétent à juger l'affaire. Il est de règle que les formes constitutives d'un jugement doivent être constatées par le jugement même, et que l'omission d'une seule en emporte la nullité ; or une des formes essentielles et constitutives d'un jugement, c'est qu'il y soit énoncé par qui le jugement a été rendu, et comment et pourquoi, à défaut des juges titulaires, d'autres ont été appelés et ont jugé ? si la loi donnait tel pouvoir à d'autres personnes ? Dans le but de mieux réprimer l'intempérance, le législateur a voulu que l'offense ne pût être jugée que par des juges saisis de la plainte, et empêcher les parties accusées de changer la composition du tribunal, en y appelant des hommes préjugés

par les intérêts ou les passions. Quand il y a empêchement, par l'absence, à constituer le tribunal tel que réglé, celui qui reste peut permettre la présence d'un autre juge. Deux faits sont nécessaires pour valider et légaliser la seconde composition du tribunal : l'absence d'un des juges premièrement saisis de l'affaire et l'assentiment du juge titulaire qui reste, à l'assistance d'un autre à la place de l'absent. La qualification de ce troisième juge repose uniquement et entièrement sur le fait de cette absence et de tel assentiment ; cette qualification est aussi essentielle pour donner juridiction que celle de sa nomination même comme juge de paix. La juridiction est toute aussi spéciale, toute aussi exclusive pour l'espèce, que celle des deux premiers titulaires à raison de l'assignation donnée par ces derniers. Les dispositions de la loi constituent des règles impératives pour la composition du tribunal. L'observation de ces règles doit être constatée dans les actes judiciaires pour lesquels elles ont été prescrites. Si l'on pouvait se dispenser de faire mention dans ces actes qu'elles ont été remplies, l'on pourrait bientôt les transgresser impunément. Le jugement attaqué ne constate ni l'absence de l'un des juges de paix premièrement saisis de l'affaire, ni l'assentiment de l'autre à l'action de celui qui a siégé avec lui. Dans toutes les affaires tombant sous la juridiction des tribunaux inférieurs, tout est de rigueur, rien n'est présumé ou sous-entendu. Ainsi, Paley dit : " Where a statute refers the matter to one (qualified) justice, no other but the one answering that description has any authority." C'est principalement dans ce qui concerne la juridiction, que la moindre omission est fatale et que l'on exige la plus extrême exactitude dans les faits qui la constituent et dans les énoncés qui la font apparaître. Paley, 147, 8. 9. Il faut que la juridiction apparaisse, non par sous-entente, par déduction, présomption, mais par affirmation et énonciation expresse de ce qui la constitue. Dans l'instance, un des juges de paix n'avait droit d'être là qu'à raison de l'absence de Malhiot et avec l'assentiment de Turcot. Le fait qu'il a siégé ne constate pas l'absence de Malhiot, non plus que l'assentiment de Turcot. Le premier a pu se retirer parce que Dufort siégeait et voulait siéger, et le second a pu continuer les séances avec Dufort, parce qu'il ignorait son droit de l'exclure et d'en appeler un autre. Son silence, en tel cas, n'est pas l'affirmation d'un assentiment. Il n'y a pas lieu d'appliquer les principes qui gouvernent les acquiescements tacites dans les affaires civiles par les parties mêmes, à certains actes de procédure. Les attributions des juges, leurs pouvoirs ne peuvent s'atténuer, se distribuer par des acquiescements tacites ; c'est droit public, et les juges n'ont d'action, d'initiative, que dans les modalités prescrites par la loi. Le droit de juger dépendant d'un fait indiqué et

prévu par le statut, ce fait doit être déclaré, énoncé distinctement et non présumé et sous-entendu. C'est par cette affirmation, par cette énonciation seulement, dans l'acte soumis à leur surveillance, que des cours supérieures peuvent connaître si la loi a été observée. Dans cette cause, un juge autre que celui désigné par la loi, s'y est immiscé et a jugé. Il pouvait avoir ce droit avenant deux éventualités prévues et indiquées ; or ces éventualités ne sont ni exposées, ni énoncées, ni indiquées dans le jugement, et le seul tribunal, que les cours supérieures peuvent reconnaître comme ayant droit d'adjuger sur l'offense, était un tribunal constitué par Turcot et Mailhiot. Le jugement est rendu par Turcot et Dufort, et la rédaction des qualités ne fait pas même voir quels étaient les juges devant lesquels l'affaire avait été portée et commencée. Il n'y avait donc pas à la face des papiers constitutifs de la juridiction, la plainte, le bref d'assignation et la condamnation, le tribunal désigné par la loi, et par conséquent pas de tribunal compétent. Tout jugement doit indiquer le fait et l'adjudication sur le fait en dispute et l'application des condamnations décrétées par la loi : cela s'applique aux affaires purement civiles, comme à celles d'une nature pénale ou criminelle. Paley (212) constate ce que doit contenir le jugement. Le jugement attaqué déclare bien " qu'il résulte pleinement de la preuve " que le défendeur avait vendu sans licence des liqueurs spiritueuses, mais ne contient pas d'adjudication même par le tribunal sur le fait, " no adjudication of conviction," comme le dit Paley et comme le veut la loi. Il y a bien une condamnation à la pénalité, mais cela n'est que la conséquence de la conviction, c'est un jugement sans verdict. Il n'y a pas de conviction proprement, et la condamnation ne peut être exécutée, s'il n'y a pas préalablement une conviction, un verdict absolu et directement affirmatif sur l'offense. Le tribunal chargé de prononcer le verdict ne l'a pas fait, mais s'est contenté d'affirmer qu'il lui paraissait résulter de la preuve que le fait reproché avait eu lieu, sans rendre la sentence qui découlait de cette opinion et de ce motif. Après avoir exposé que le tribunal qui a jugé n'était pas compétent par sa composition, et que le jugement rendu est nul et sans force, faute de conviction, il suffira de dire sur le défaut d'adjudication, sur les exemptions réclamées par le défendeur, qu'en règle générale, les juges de paix doivent adjuger sur les exceptions qui attaquent leur juridiction ou qui réclament des exemptions, afin de permettre aux cours supérieures d'apprécier la justice de ces exceptions et leur adjudication sur les matières basées presque toujours uniquement sur des considérations légales et intéressant toute la société. L'exception réclamée, fondée sur un droit de faire ce qui a été fait, devait être décidée. Quelquefois elle enlève toute juridiction au

juge de paix par la disposition de la loi seule, et il serait utile de mettre à la connaissance des juges de paix, l'enseignement de Paley sur leurs devoirs en pareilles circonstances, (121). Cette exception est tellement favorable que Paley ajoute (122) " upon a suggestion of title, the Court of Queen's Bench, at " any time, while the conviction remains below and has not " been removed by *certiorari*, will grant a prohibition after " conviction to stop the justice from proceeding upon it." Cette exception fondée sur le paiement de la licence au percepteur du revenu et le papier que lui a donné ce dernier, est-elle justifiée par les faits que Dubord invoque ? Pourrait-il se croire raisonnablement autorisé à vendre et détailler des boissons ? Dubord a bien payé le montant requis pour sa licence, et à l'officier seul chargé de recevoir cet argent et d'octroyer la licence. La réclamation de cet officier, quelques semaines après, contre son propre acte, semble indiquer plutôt que le reçu et l'écrit donné à Dubord couvraient son droit à vendre. Si cet officier eût toujours été d'opinion que le règlement municipal indiqué dans son écrit était bon et suffisant, il n'y aurait jamais eu de poursuite et de trouble. Mais Dubord ne doit pas dépendre de cette opinion et des changements qui se feront dans l'esprit de cet officier. L'on peut et l'on devrait s'enquérir si l'examen sérieux des règlements ne permet pas de dire que, d'après les règlements municipaux, Dubord avait droit à l'octroi d'une licence. (Le juge examine les règlements municipaux). Cet examen, dit-il, démontre que tout ce qui a été fait a été fait en conformité au règlement du comté passé en mars, et que tout est strictement légal à ce point de vue. La doctrine de *Paley* est sage et rationnelle, quand elle recommande aux juges de paix de ne pas entrer dans ces questions de droit, et qu'il faut renvoyer le défendeur, s'il fait voir un droit plus ou moins contestable, et, surtout, que les droits qu'il invoque comme ses titres existaient longtemps avant l'accusation, et qu'ils émanent de celui qui réclame contre lui. Cela, comme de raison, ne peut constater que le papier que Dubord montre pour constater son droit et son exception, est un titre parfait, mais sert à constater ses impressions, sa croyance et, par conséquent, son innocence par l'absence d'intention de violer la loi. Il faut dire que la conduite de l'officier ministériel milite contre lui-même ; recevoir l'argent pour payer la licence demandée, c'était admettre qu'il allait la faire émaner ; ce n'est pas un dépôt fait entre ses mains, ce papier est signé du percepteur du revenu, c'est l'état parlant par lui qui déclare que le paiement a été fait pour payer une licence d'auberge pour lequel on a obtenu le certificat du conseil du comté. Il n'y a pas de réserve pour examiner si ce règlement est légal et suffisant. La présomption de droit est que la licence même n'était

pas accordée de suite, parce qu'on n'avait pas le temps de ce faire, mais le droit à a licence restait bien constaté par le paiement accepté purement et sans réserve et explications. Cela ressort des termes du protêt, comme du fait même d'un protêt. Il y a injustice quand des officiers ministériels se mettent au-dessus de la loi par des interprétations qui ne sont pas dans leurs attributions. Les conseils municipaux ont le droit de réglementer la vente des boissons, et non le percepteur du revenu ; s'il peut dire, le règlement de prohibition n'est pas bon, et accorder des licences, c'est lui qui réglemente et non le conseil municipal. L'ordre de la loi est interverti. Cela est toujours dangereux. La protection pour tous est dans la stricte exécution de la loi. Il y aurait oppression trop souvent, si la loi ne dépendait que de l'arbitraire des officiers ministériels, et si, dans l'application de la loi par les tribunaux inférieurs, on n'exigeait pas la stricte observation des formalités, quand elles tendent à protéger des individus. Il doit être décidé, comme il l'est, que le *writ de prohibition* a été bien émané, et que défense doit être faite aux juges de paix de procéder sur l'exécution du jugement attaqué. Il ne doit pas être accordé de frais contre l'officier du revenu, parce qu'il est officier public et comme tel représente la couronne, ni contre les juges de paix qui ne doivent être condamnés à payer des frais, que lorsqu'il y a prise à partie contre eux. (14 *J.*, p. 203)

BOURGEOIS et BACHAND, avocats du demandeur.

CHAGNON, SICOTTE et LANCTOT, avocats du défendeur.

DONATION.

COUR SUPÉRIEURE, Montréal, 31 janvier 1870.

Coram MONDELET, J.

PAQUIN *vs* BRADLEY *et al.*

Jugé: 1. Que la donation limitée à des choses désignées particulièrement est une donation à titre particulier. (1)

2. Que le donataire à titre particulier n'est pas tenu personnellement aux dettes du donateur. (2)

Le demandeur réclamait des défendeurs le montant d'un billet souscrit par leur mère, le 15 août 1862, pour £35 2s. 6d., et il alléguait que, par acte de donation consenti le 16 octobre 1865, devant Savard, N. P., la mère des défendeurs leur avait

(1) Art. 780 C. C.

(2) Art. 799 C. C.

fait donation entre vifs de deux terres et d'une certaine quantité de biens meubles y énumérés. Le demandeur, en conséquence, concluait à ce que les défendeurs fussent déclarés les donataires universels ou à titre universel de leur mère, et condamnés au paiement du montant de ce billet qui était une dette due et échue à l'époque de la donation. Les défendeurs plaidèrent que le titre en vertu duquel ils possèdent certains biens à eux donnés par leur mère est une donation à titre particulier, et qu'en vertu de tel titre ils ne peuvent être tenus personnellement qu'au paiement des dettes par eux assumées, et que la créance réclamée par cette action n'est pas du nombre de celles dont ils ont assumé le paiement, et que la donatrice ne leur a pas donné tous les biens qu'elle possédait lors de la donation en question.

" La Cour, considérant que le demandeur n'a pas établi son droit d'action, et, nommément, que la donation par *Content Judd*, mère des défendeurs, aux défendeurs, en date du 16 octobre 1865, reçue devant Savard et confrère, notaires, est une donation à titre universel; considérant que ladite donation est une donation à titre particulier; considérant, par conséquent, que les défendeurs ne sont pas tenus envers le demandeur de la dette dont il poursuit le recouvrement par la présente action, laquelle a été contractée envers le demandeur par la mère des défendeurs qui, par ladite donation, ne sont pas donataires à titre universel, mais bien à titre particulier; considérant que les défendeurs sont bien fondés en leur exception péremptoire, la cour la maintient, et déboute le demandeur de son action avec dépens." (14 *J.*, p. 208)

JETTÉ & ARCHAMBAULT, avocats du demandeur.

DOUTRE, DOUTRE & DOUTRE, avocats des défendeurs.

EXCEPTION A LA FORME.

COUR SUPÉRIEURE, Montréal, 30 novembre 1869.

Coram MACKAY, J.

MALLETTE *vs* TREMBLAY.

Jugé: Que, par suite d'une exception à la forme fondée sur ce que la copie de la déclaration n'était point certifiée, le demandeur ayant obtenu la permission de la cour de signifier une nouvelle copie au défendeur, en payant les dépens encourus sur l'exception à la forme jusqu'alors, le défendeur ne doit plus procéder sur icelle exception à la forme qui est devenue caduque et inutile.

Le 20 novembre 1866, le défendeur produisit une exception à la forme fondée sur ce que la copie de la déclaration

qui lui avait été signifiée n'était pas certifiée vraie copie, ni signée par le procureur du demandeur. Le 25 février 1867, le demandeur fit motion qu'il lui fût permis de faire signifier à ses frais au défendeur la déclaration, en lui faisant laisser une copie dûment certifiée, en par le demandeur payant aux avocats et procureurs du défendeur les frais qu'il plairait à la cour de fixer sur l'exception à la forme. Le 27 février 1867, cette motion fut accordée par la cour qui ordonna au demandeur de payer les dépens encourus sur l'exception à la forme jusqu'à ce jour-là. Le 16 octobre 1869, le demandeur, ayant fait signifier au préalable une nouvelle copie de la déclaration et ayant fait taxer les frais sur l'exception à la forme à $12.50, fit offres de cette somme au défendeur et le somma de plaider au mérite. Le défendeur ayant inscrit la cause pour l'enquête et l'audition au mérite sur cette exception à la forme, et les parties ayant été entendues, la cour a rendu son jugement comme suit:

"The court, considering that plaintiff, under the leave granted him has served true copy of his declaration upon defendant and has, on the 16th October, 1869, offered and deposited all that he was bound to; doth declare the *exception à la forme* spent and to be of no further force as from and after the said offers of plaintiff, of 16th October, 1869; and, further, doth declare the inscription for *enquête* and hearing on said *exception à la forme* (said inscription fyled 18th October, 1869) to have been unnecessary, and the costs of proceedings upon the same to have been and to be upon defendant, and the court orders the cause to be proceeded with by and upon such other and further proceedings as to law and practice appertain; and, considering that, by reason of the findings aforesaid, the motion of plaintiff to reject deposition of the witness Mireault is unnecessary, it is ordered that plaintiff take nothing by said motion, without costs." (14 *J.*, p. 209)

MIREAULT, avocat du demandeur.

DUHAMEL, avocat du défendeur.

SALE OF A VESSEL.—FRAUDULENT ASSIGNMENT.

SUPERIOR COURT, Montréal, 31st March, 1870.

Coram TORRANCE, J.

CALVIN *et al. vs* TRANCHEMONTAGNE *et al.*, and THOMAS *et al.*, oppts.

Held: That, by C. C., art. 2361, transfers of a Canadian steamer, not made and registered in the manner prescribed by the Act respecting the registration of inland vessels, referred to in C. C., art. 2360, did not convey to the purchaser any title or interest in the vessel intended to be sold.

2nd That a general assignment by an insolvent to trustees, inasmuch as it did not conform to the Insolvent Act of 1864, 27-28 Vict., ch. 17, was in law a fraudulent conveyance by the enactments of said Act, especially sec. 3, § i.

This case was before the court on the merits of an opposition *à fin de distraire.* The opposants, Henry Thomas, William Sache and Benjamin-Henry Lemoine, in their quality of trustees of the property of the heretofore firm of Frederick Saint-Louis & Co., claimed *mainlevée* of a seizure of the steamer "Topsy." The opposition alleged an assignment by this firm to them on the 26th March, 1868, because they were unable to meet their engagements, and, among the property assigned, was the steamer "Topsy," of a tonnage of 65 tons. Subsequently, by an *acte* of date 1st March, 1869, Jobin, notary, opposants sold the steamer "Topsy" to Sincennes & McNaughton; that this firm was then in possession, and opposants, *es-qualité*, as their *garants*, had a right to oppose the seizure and claim *mainlevée* of the steamer. The plaintiffs fyled several *moyens* of contestation to this opposition. An answer in law firstly fyled was dismissed. A second answer alleged that defendants had given plaintiffs a mortgage for $1,823.30, the amount of their debt on the steamer "Topsy;" that the debt was incurred for an engine supplied by plaintiffs to the "Topsy," and it was agreed, at the time of the supply, that the mortgage should be given for the payment of the engine; that the judgment now sought to be executed was for the amount of the mortgage; that the mortgage had been duly registered in the custom-house at Montreal. A third answer alleged that defendants were still the registered owners of the "Topsy." A fourth answer set forth the obligation set forth in the second answer and the consideration of it. The answer further alleged that, notwithstanding the pretended insolvency of Frederick Saint-Louis & Co., the right of plaintiffs, as mortgagees, cannot be affected by said assignment; that the opposants can have no claim until they have paid plaintiffs the sum of $1,823.30. The last answer was general. The opposants replied to the first answer of plaintiffs that the mortgage invoked by plaintiffs was given on the 27th December, 1867, to secure an antecedent debt and at a time when defendants were notoriously insolvent, and said mortgage was null as made in fraud of creditors, especially of Henry Thomas, one of opposants; that, supposing that plaintiffs were creditors, they could not seize the "Topsy" in the hands of Sincennes and McNaughton who were not parties to the mortgage or judgment. The opposants, therefore, prayed that the said mortgage might be declared null and void, as having been made in fraud of creditors, especially of Henry

Thomas, one of them. The opposants answered the second answer of plaintiffs, that the opposants were in possession of the "Topsy" from the 26th March, 1868, to 1st March, 1869, and since this last date the "Topsy" was in possession of Sincennes and McNaughton, as proprietors.

The court remarked, in rendering the judgment on the merits of the opposition, that the question of title between the parties should first be looked at, in relation to the validity *per se* of the conveyance alleged by the opposants to them, and, if that were decided in their favour, it would be necessary to look at the title claimed by plaintiffs, by their deed of 26th December, 1867. In other words, opposants must succeed, if at all, by the strength of their own title rather than by the weakness of plaintiffs' title. The plaintiffs argued that opposants claiming the proprietorship of an inland vessel, it was necessary for them to shew a compliance with the Act respecting the registration of inland vessels, 8 Vic., c. 5; C. S. C., cap. 41, secs 13 and 16, and with C. C., arts 2360, 2361, which required that the transfer of vessels should be made in a certain form, and to be registered at the custom-house, and declared that otherwise no title or interest should be conveyed to opposants, and plaintiffs remarked as to the claim to oppose as the *garants* of Sincennes and McNaughton, how could the opposants be their *garants* if, by non-compliance with the law, they conveyed no interest to them. The plaintiffs further contended that the assignment of 26th March, 1868, by defendants to opposants, *ès-qualité*, was in contravention of the Insolvent Act of 1864, which said that a debtor shall be deemed insolvent and his estate shall become subject to compulsory liquidation, *inter alia*, if he has made any general conveyance or assignment of his property for the benefit of his creditors, otherwise than in the manner prescribed by this Act, sec. 3, § *i*. The court was of opinion that opposants had not so complied with the provisions of the Shipping Act, cited by plaintiffs, either as regards the form of the assignment or its registration in the custom-house, as to enable the court to regard them as having been proprietors of the steamer "Topsy." Further, they had violated the provisions of the Insolvent Act in accepting of the general assignment of the insolvent to them, without complying with the requirements of that Act, and their interest either as having been proprietors under the assignment, or as *garants* of Sincennes and McNaughton, was not an interest that the court should notice.

"The court, considering that, by the assignment of 26th of March, 1868, from Frederick Saint-Louis & Co. to opposants, F. Geoffrion, N. P., and by the sale of 1st March, 1869, F. Geoffrion, N. P., from opposants to Sincennes and McNaugh-

ton, opposants have not complied with the requirements of the Act respecting the registration of inland vessels referred to in the Civil Code of Lower Canada, article 2360; considering that, by the article 2361 of said code, transfers of vessels, such as the steamer "Topsy," claimed by opposants, not made and registered in the manner prescribed by the said Act, do not convey to the purchaser any title or interest in the vessel intended to be sold; considering, further, that the said assignment, inasmuch as it did not conform to the Insolvent Act of 1864, was in law a fraudulent conveyance by the enactments of said Act, especially of sec. 3, § *i*; doth maintain the contestation by plaintiffs of said opposition, and doth, accordingly, dismiss said opposition with costs." (14 *J.*, p. 210)

DORION, DORION and GEOFFRION. for opposants.

RITCHIE, MORRIS and ROSE, for plaintiffs contesting.

SALE BY MARRIED WOMAN FOR CONSIDERATION TO HER HUSBAND

SUPERIOR COURT, IN REVIEW, Montreal, 9th July, 1870.

Coram BERTHELOT, J., MACKAY, J., and BEAUDRY, J.

BÉLANGER *et vir vs* BROWN.

Held: (Confirming the judgment below) That a deed of sale made by a wife *commune en biens* to a third party of her *propre* for a pretended consideration of $400, when the real consideration was a lease of moveables by the third party to her husband, will be set aside as a contravention of C. C., art. 1301.

This case came up on the inscription of the defendant for the revision of the judgment rendered by the Superior Court, at Montreal, on the 31st March, 1870, TORRANCE, J., maintaining plaintiffs' action. Here follow the remarks and the judgment of the Superior Court.

TORRANCE, J.: The female plaintiff, Adélaïde Bélanger, has brought her action to set aside a deed of sale of her *propres* to defendant, as made without consideration, and as an indirect security given by her to defendant for an obligation of her husband. The declaration sets out a deed of sale, of date 24th December, 1867, J. Simard, N. P., by which Adelaïde Belanger, authorized by her husband, Antoine Lemieux, transferred to defendant an undivided fourth part in certain lots of land in the Saint-Antoine suburbs. The consideration stated by the deed was $400, acknowledged to have been received by the female plaintiff from defendant. The declaration alleged that no such sum had been received, and that the

discharge stated had been given by error, without cause or consideration, and by reason of the *dol* and fraud of the defendant; that the said sale and discharge had only been agreed to by plaintiff to cover a guarantee (*cautionnement*) of her husband, and in reality to guarantee a debt of her husband; that, in fact, by a deed of lease passed before J. Simard, N.P., the 24th December, 1867, defendant leased to Antoine Lemieux, her husband, certain moveables (named in the deed) for a rent of $800, part payable in 1868, part in 1869, and part in 1870; that the female plaintiff, with the view of binding herself with and for her husband, and to guarantee his debt to defendant, agreed to the said *acte* of sale and gave the discharge in question, without cause or consideration; that, in consequence, the said sale is null and void, and the discharge has been given without cause or consideration, and is null and of no effect. The female plaintiff, therefore, prayed that the said *acte* of sale may be declared null and of no effect, and that the discharge may be declared to have been given by error, without cause or consideration, and that defendant be condemned to retrocede to plaintiff the said land, and give a deed and title therefor, within such delay as may be fixed by the court, and in default of his so doing that the judgment to intervene may serve for such deed. The plea of defendant, in effect, averred that the consideration of the deed of sale in question was true, and the *acte* agreed to for such consideration. With respect to the evidence, there is little difficulty. The defendant is examined as a witness, and, when pressed as to the consideration for the deed of sale, says that the deed of lease should have been made to plaintiff, that such was his intention, and, if it was otherwise, it arose from the mistake of the notary. There remains the question of law, how far the court has it in its power to relieve plaintiff. C. C., art. 1301, says: "A wife cannot bind herself either with or for her husband, otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect." The defendant argues that this action could not be brought during the community, to which plaintiff replies, that the action is a personal action and could not be brought against third parties in good faith in possession of the *propres* of plaintiff, and it was, therefore, necessary for her to have the sale set aside as soon as possible, without waiting for the dissolution of the community. The defendant further contends that the article 1301 does not apply to the wife *commune en biens*; to which plaintiff replies that, when she sold her *propres*, as she had done in the present case, she did not bind herself as *commune en biens*. The court is with plaintiff. If redress were denied to plaintiff, defendant

is allowed to do that indirectly which he could not do directly. The judgment of the court will, therefore, grant the conclusions of the declaration of plaintiff.

"The court, considering that it is proved that the sale purporting to be made on the 24th December, 1867, by plaintiff, Adelaïde Belanger, to defendant, by *acte* of that date, passed before J. Simard, N.P., of the following properties, to wit: (here follows a description of the properties), was made without consideration or cause, and without payment of the sum of $400 alleged to have been paid by defendant to the female plaintiff, Adelaïde Belanger; considering that the only consideration for said sale was the lease from defendant to plaintiff, Antoine Lemieux, husband of the female plaintiff, of the 24th December, 1867, and that the female plaintiff could not bind her *propres* for the obligations of her husband, as she has done by the said *acte* of sale, doth declare the said deed of sale, of 24th December, 1867, by Adelaïde Belanger to defendant, passed before J. Simard, N.P., of the said immoveables, to be null and of no effect, and the discharge given by the said deed of sale to defendant for the said sum of $400 to have been given by error, without cause or consideration, and doth order defendant, within fifteen days after the signification of the present judgment upon him, to retrocede and reconvey to plaintiff, by a sufficient deed, the said immoveables, and, in default of defendant so doing within said delay, the court doth order that this judgment operate in favor of plaintiff, as such reconveyance.

This judgment was confirmed in review.

MACKAY, J., dissenting: I hold the plaintiff's action bad. True, defendant's plea is not straightforward, and pretends the contrary of the truth; but this does not make legal plaintiff's pretensions. She states all about the transaction, and says that she may have her conclusions, because of her having only become surety for her husband. I hold that a wife *commune* may sell her *propre*, with her husband's consent, and let the money go into the community, or even to pay her husband's debt. Till the dissolution of the community she is *commune*. Let her, on the dissolution, renounce, if she please, and then go against the community and against her husband's estate and property generally, or claim back her *propre aliéné*, alleging that the alienation was mere suretyship for her husband, and that she could not become surety for him except as *commune en biens*, and that renouncing she ceases to be *commune* and may revendicate, by force of our law against wives' suretyships for their husbands; but if she accept the community, let her not pretend to revendicate; for her alienation of her *propres* would in such case be established

as mere suretyship by a wife *commune*, which is permitted. In this very case, plaintiff's husband may die rich, and she may accept the community, say five or ten years hence. The rights of the woman accepting the community, in such case of alienation of her *propres* for her husband's, or the community's purposes, are plain : exactly what they were one hundred years ago, and what they have been ever since, art. 232 of the Custom of Paris; art. 1357 C. C. This is the law and means something; but would be a dead letter if the plaintiff prevailed. She is not to go free, at any rate, as to the rents, issues and profits, during the community, of this *propre*. They are Brown's; as plaintiff's husband during the community (supposing this deed had never been) might have had, or might have, them. *Boudria* and *McLean* (1), I approve of. The woman was heard, having renounced to the community. So of Sainte-Marie in *Pinsonneault* vs *Brosseau*, and *Sainte-Marie*, opposant (2); and so of *Byrne* vs *Trudeau* (3). The

(1) La femme commune en biens peut, pendant la communauté, avec l'autorisation de son mari, ratifier la vente d'un immeuble conquêt de la communauté faite par le mari, et cette ratification constitue une renonciation à l'hypothèque qu'elle a sur cet immeuble pour ses reprises. En faisant une telle ratification, la femme ne se porte pas cependant caution et n'encourt aucune responsabilité pour les dettes, engagements ou obligations contractés par son mari, et la renonciation qui s'ensuit ne viole aucunement les dispositions de l'Ordonnance de 1841, 4 Vict., ch. 30, qui décrétait sec. 36 : "Nulle femme mariée ne pourra se porter caution ni encourir de responsabilité en aucune autre qualité que comme commune en biens avec son mari, pour les dettes, obligations ou engagements contractés par le mari avant le mariage, ou pendant la durée de leur mariage, et tous engagements et obligations contractés par une femme mariée, en violation de cette disposition, seront absolument nuls et de nul effet. "Si la femme, en ratifiant la vente, s'est obligée à la garantie de la vente conjointement et solidairement avec son mari, cette ratification est valide comme renonciation à ses reprises, mais l'obligation de garantie est nulle comme contraire aux dispositions de ladite ordonnance. (*Boudria et vir* et *McLean*, C. B. R., Montréal, 4 mars 1862, LAFONTAINE, J. en C., AYLWIN, J., dissident, DUVAL, J., MEREDITH, J., et C. MONDELET, J., dissident, confirmant le jugement de C. S., Trois-Rivières, 7 février 1861, POLETTE, J., 12 D. T. B. C., p. 135; 6 J., p. 65, et 10 R. J. R. Q., p. 24)

(2) Aux termes de la sec. 36 ci-dessus citée de l'Ordonnance de 1841, 4 Vict, ch. 30, nulle et de nul effet est l'obligation de garantie de la part de la femme mariée, stipulée dans une vente, consentie à un tiers par cette femme et son mari, d'un bien de la communauté alors existante entre eux à laquelle elle a depuis renoncé après séparation de biens obtenue par sentence judiciaire. Art. 1301 C.C. (*Pinsonneault* vs *Brosseau*, et *Sainte-Marie*, oppte, Cour d'Appel, Montréal, 11 janvier 1847, ROLLAND, J., DAY, J., 3 Rev. de Lég., p. 134, et 13 R. J. R. Q., p. 505)

(3) L'obligation consentie par la femme mariée commune en biens, conjointement avec son mari, avec hypothèque sur l'immeuble de la femme, est nulle aux termes de la sec. 36 ci-dessus citée de l'Ordonnance de 1841, 4 Vict., ch. 30, s'il y a eu depuis séparation de biens par sentence judiciaire et exécution du jugement prononçant la séparation. Art. 1301 C. C. (*Byrnes* vs *Trudeau et ux.*, C. S., Montréal, 30 novembre 1863, BERTHELOT, J., 14 D.T.B.C., p. 17, et 12 R. J. R. Q., p. 232)

wives had renounced to the community (4). No case can be shown of a woman *commune*, before any dissolution whatever of the community, getting free from her act of alienation or hypothecation of her *propres*. If a woman *commune* alienate or hypothecate her *propres*, let her, during her husband's life, and so long as she is *commune*, be treated as a wife *commune* used to be in old France or here, say in 1800. Could a wife, holding to the community and her husband living, have brought, in Lower Canada, such an action as the present in 1800? No. Art. 232 of the Custom of Paris is in force still. Our code recognizes alienations of the wife's *propres* and provides for *remploi*. But, according to plaintiffs, " remploi des propres aliénés de la femme " is no longer to be talked of. I hold the contrary. It is to be talked of, as much as ever, under the *régime de communauté* and where the wife holds to the *communauté*, as the female plaintiff does.

(4) Aux termes de la sec. 36 ci-dessus citée de l'Ordonnance de 1841, 4 Vict,. ch. 30, la femme mariée ne peut s'obliger avec son mari que comme commune en biens, et nul est le cautionnement donné à un tiers, pendant la communauté, par la femme conjointement avec son mari, lorsque depuis est intervenue sentence judiciaire en séparation de biens et que la femme a renoncé à la communauté. (*Jodoin* et *Dufresne et ux.*, C B. R. en appel, Montréal, 12 mars 1853, confirmant le jugement de C. S., 12 octobre 1852, 3 D. T. B. C., p. 189, et 3 R. J. R. Q., p. 480)

Deux obligations notariées signées par une femme séparée de biens avec l'autorisation de son mari et dans lesquelles elle se reconnait débitrice des sommes mentionnées dans ces contrats, tandis qu'en réalité c'est le mari qui les doit, sont nulles et ne sortent aucun effet par le motif qu'elles ont été passées en contravention aux dispositions de la sec. 36 ci-dessus citée de l'Ordonnance de 1841, 4 Vict., ch. 30, la femme mariée ne pouvant s'obliger avec son mari que comme commune en biens. (*Mercille* et *Fournier et vir*, C. B. R. en appel, Montréal, 7 juin 1859, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J., dissident, MEREDITH, J., confirmant le jugement de C. S., Montréal, 30 avril 1858, SMITH, J., 9 D. T. B. C., p. 300; 2 J., p. 205; 4 J., p. 51, et 7 R. J. R. Q., pp. 7 et 9)

L'Ordonnance de 1841, 4 Vict., ch. 30, en voulant protéger les acquéreurs de biens-fonds, a pourvu aux moyens de les garantir contre les réclamations des femmes. Presque tous les droits de ces dernières peuvent être mis à néant; la seule protection qui leur est accordée est celle qui résulte de la 36e clause de l'Ordonnance, laquelle défend à toute femme mariée de se porter caution ou d'encourir aucune responsabilité, si ce n'est comme commune en biens, pour les dettes, engagements ou obligations que son mari pourrait avoir contractés avant leur mariage ou pendant la durée de leur mariage. Cette loi est une loi d'ordre public. Toute tentative de l'éluder est une fraude et la preuve testimoniale est admissible pour l'établir; autrement il serait inutile pour le législateur de faire de semblables lois, s'il suffisait, pour les éluder, que la fraude fut couverte par un acte notarié. Le fait de permettre la preuve testimoniale pour établir qu'un acte est complètement nul à raison de l'illégalité de la matière sur laquelle il stipule, ne semble pas violer la règle générale du droit anglais, qui veut que la preuve testimoniale soit inadmissible pour contredire ou changer les termes d'un écrit valide, car, d'après ce même droit, la preuve testimoniale peut être permise pour démontrer que le contrat dont on se plaint a été fait pour l'avancement d'affaires prohibées par la loi. (*Mercille* et *Fournier et vir*, C.B.R. en appel, Montréal, 7 juin 1859, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J., dissident, MEREDITH, J., confirmant le jugement de C. S., Montréal, 30 avril 1858, SMITH, J., 9 D. T. B. C., p. 300; 2 J., p. 205; 4 J., p. 51, et 7 R. J. R. Q., pp. 7 et 9)

Were we to adopt plaintiff's argument, we should have to hold that the *propres* of the wife, *commune*, are inalienable. Nobody will say that they are. Now, as in 1800 and before, her *propres* may be alienated by her. Wives *communes* shall not be allowed actions revocatory, or *en nullité*, of their alienations of their *propres*, but shall be referred to their other rights under the code, which settles all that they are entitled to. No case can be shown of a wife *commune*, living her husband, getting free of her obligation as *commune*, merely because it was an obligation for her husband, or at his request, or to pay his debt. C. C., art. 1301, does not favor the present action, but quite the contrary. It involves that a wife *commune* can bind herself and act as freely as wives *communes* ever could. The Velleien prohibited any woman from obliging herself for others. Henry IV abolished it. We have, in a qualified way, given it force again. But only to the extent that we have enacted is our law different from what it was in old France, after Henry IV's abolition of the Velleien, and before we made the enactments we have, in favor of wives *séparées* or *non communes:* the enactments which now are in the art. 1301 C.C. The plaintiffs are man and wife under the *régime de communauté.* The woman does not affect to be other than *commune en biens.* I cannot conceive her to have right, without and previous to any kind of dissolution of the community, to ask that her alienation of a *propre* be declared illegal, *as given for the uses of her husband.* The plaintiff's declaration shows the alienation referred to to have had a cause, a legal cause. The defendant got alarmed at the action, however, and pleaded a cause other than the real one. He was in bad faith so pleading; yet his bad faith in so doing cannot give right to the plaintiff without law. I would dismiss plaintiff's action and let each party bear his own costs.

BERTHELOT, J.: La demanderesse, commune en biens avec son mari, Antoine Lemieux, et durant la communauté, poursuit le défendeur pour faire prononcer la nullité de la vente qu'elle lui a faite, le 24 décembre 1867, sous autorisation maritale, de son propre, pour couvrir et assurer, dans le fait, le paiement d'une vente faite par le défendeur à son mari, de chevaux et voitures, sous un contrat de louage déguisé, au lieu d'avoir été pour valable considération donnée et payée à la demanderesse, ainsi qu'il a été exprimé en l'acte de vente. Le défendeur a plaidé, purement et simplement, que la considération exprimée en l'acte du 24 décembre 1847 était vraie. La preuve a fait voir le contraire, et elle résulte même des aveux du défendeur et des contradictions de son témoignage. La première question soulevée, lors de l'argument, est de savoir si pareille action peut être intentée par la femme durant

la communauté, attendu qu'elle rejaillirait contre elle-même comme commune. Bien que cette question ait été très controversée par les auteurs, elle doit être résolue en faveur de la demanderesse, parce que, ainsi que je l'ai fait remarquer à l'audition, s'il leur fallait attendre un évènement aussi incertain que la dissolution de la communauté, par son décès ou celui de son mari, elle ou ses héritiers ne pourraient peut-être plus alors rapporter la preuve des faits nécessaires pour l'exercice de leurs droits. Ce pourrait être le cas pour elle en cette cause, puisque sa preuve ne procède que de la bouche même du défendeur, et c'est là sa seule preuve. La seconde difficulté soulevée à l'argument est qu'il n'y avait pas de preuve que l'immeuble était le propre de la demanderesse; cette dernière n'avait pas besoin de faire d'autre preuve que celle qui lui résultait de l'acte de vente même, et l'acheteur, le défendeur, ne pouvait soulever une objection qui ne pouvait valoir que dans la bouche d'un tiers; et ce n'est pas le cas de l'application du n° 737 des Obligations de Pothier (vol. 2 de l'édition Bugnet, p. 401) cité par le défendeur, où il s'agissait d'une action en revendication par un tiers qui se disait héritier pour partie du vendeur contre l'acquéreur de ce dernier. La troisième question qui est le fond même de la demande, est de savoir si la femme commune peut aliéner valablement son propre ou s'obliger pour les affaires de son mari. Le jugement dont la revision est demandée a maintenu ce principe et la majorité de la cour est pour le confirmer et maintenir la même doctrine que celle qui a été maintenue dans un grand nombre de jugements devant cette cour. La femme commune qui vend son propre pour payer la dette de son mari ou pour garantir ses obligations et l'aider dans son commerce, ne s'oblige pas seulement comme commune, mais elle s'oblige directement pour son mari, et c'est ce que la loi a eu en vue de prohiber sous quelque forme que ce soit, pour assurer la fortune de la femme de l'atteinte des mauvaises affaires du mari. Le défendeur a rapporté dans son factum l'opinion qui est donnée comme celle du juge MEREDITH, lors du jugement dans la cause de *Boudria* et *McLean*, en appel. " A married woman " unquestionably has the power of alienating her own *propres* " to pay the debt of her husband." Si cette proposition est vraie en droit, abstractement parlant, ce ne peut être que lorsque la femme reçoit réellement le prix de son propre et l'emploie librement à payer la dette de son mari, mais non pas dans ce cas-ci, lorsqu'elle le vend pour faire faire commerce à son mari. Cette maxime ne peut pas plus prévaloir dans cette cause qu'elle n'a prévalu dans la cause de *Boudria* vs *McLean*, dans laquelle le juge MEREDITH a partagé l'opinion de la majorité de ses collègues sur la décision à rendre. Si elle

devait prévaloir, que deviendrait la prohibition des avantages indirects entre mari et femme? Quant au petit fait, que la demanderesse est allée avec le défendeur chercher les chevaux et les voitures en question, je n'y vois qu'une manœuvre à laquelle la demanderesse s'est soumise pour aider son mari à lui enlever son bien.

Judgment confirmed. BEAUDRY, J., concurred. (14 *J.*, pp. 212 et 259)

DUHAMEL and RAINVILLE, for plaintiff.

LORANGER and LORANGER, for defendant.

ELECTION MUNICIPALE.

COUR DE CIRCUIT, Saint-Hyacinthe, 23 mars 1870.

Coram SICOTTE, J.

MELANÇON *vs* SYLVESTRE.

Jugé: Que du moment que le président d'une élection de conseillers municipaux a déclaré élus les sept candidats proposés, l'élection est alors terminée; qu'il n'est pas légal de proposer ensuite de nouveaux candidats et de tenir un *poll*; que si un *poll* est dans ce cas tenu, ce sera illégalement, et aucune personne votant à cette élection, quoique sans avoir les qualités requises par la loi pour lui donner le droit de voter à une élection municipale, n'encourra par ce fait l'amende de vingt piastres prescrite par le § 5 de la section 62 du ch. 24 des Statuts Refondus du B. C.

Dans l'espèce, le président de l'élection des conseillers municipaux de la paroisse de Sainte-Hélène ouvre l'élection à dix heures de l'avant-midi, le second lundi de janvier 1870; sept candidats sont proposés, et l'élection n'étant pas alors contestée par plus de trois électeurs habiles à voter, le président déclare les sept candidats dûment élus. Immédiatement après, arrivent des électeurs qui se déclarent (dit le rapport du président de l'élection) non satisfaits des conseillers élus; le président consent à ce que d'autres candidats soient proposés, et un *poll* est en conséquence tenu. Le défendeur, qui n'est pas électeur municipal, vote cependant à cette élection. Le demandeur *qui tam* le poursuit pour l'amende de $20, pour avoir voté sans être qualifié. La cour décide que le défendeur n'a encouru aucune amende en donnant *son vote*, quoique n'étant pas électeur municipal; que les sept premiers candidats proposés ayant été déclarés dûment élus, l'élection se trouvait alors terminée, et il n'était plus au pouvoir du président de recevoir de nouvelles propositions de candidats, tenir un *poll* et prendre les votes des électeurs. L'action est en conséquence déboutée. (14 *J.*, p. 217)

BOURGEOIS et BACHAND, avocats du demandeur.

FONTAINE, MERCIER et DECAZE, avocats du défendeur.

CAPIAS.

SUPERIOR COURT, Montreal, 31st May, 1870.

Coram TORRANCE, J.

VANDEN KOORNHUYSE *vs* GRONDIN.

Held: 1. That a debt under a bill of lading signed at Marseilles, in France, for the delivery of goods at Montreal, where the carrier made default in delivery, and the value of the goods is demanded, is not a debt created without the province of Canada, C. C. P., art. 806.

2. That such a debt is not a claim for unliquidated damages, requiring an order from a judge under C. C. P., art. 801.

PER CURIAM: This case is before the court on a motion to quash a writ of *capias ad respondendum*; 1stly because the contract upon which the claim was based was entered into at Marseilles, in France, and must therefore be regarded as a foreign debt, for which a *capias* could not issue, C. C. P., art. 806, 2ndly because the claim was for unliquidated damages and a judge's order was necessary under C. C. P., art. 801. The affidavit upon which the *capias* issued set forth a bill of lading signed by defendant, at Marseilles, for the carriage from Marseilles to Montreal, of "*un baril*" Burgundy Port, of the value of $35, and another bill of lading to the same effect, of "*un baril absynthe*" of the value of $45, making in all $80, to recover which sum the arrest is made. The court is of opinion that this is not a foreign debt in the sense intended by C. C. P., art. 806. The debt to be a foreign debt must have been created without Lower Canada. In the present case, though the inception of the debt was abroad, yet, the right of action was only completed in the province. *McDougall* vs *Torrance*, (1). The court is further of opinion that the claim

(1) Un jugement rendu dans la province, condamnant le maître d'un vaisseau transatlantique à payer à un passager qui avait fait la traversée de l'ocean dans son vaisseau, de Glasgow à Montréal, la valeur du bagage de ce passager, lequel avait été volé à bord du vaisseau, ne constitue pas une dette ayant pris naissance en un pays étranger dans le sens du ch. 87 des S. R. B. C. de 1861, sec. 7, §2, intitulé: "Acte concernant l'arrestation et l'emprisonnement pour dettes ainsi que le soulagement des débiteurs insolvables." Un jugement avait été rendu par la Cour Supérieure contre le défendeur, maître de vaisseau, résidant à Glasgow, en Ecosse, le 29 février 1860. Le défendeur ne vint pas dans la province en 1860, mais il y arriva dans le mois de mai 1861 à bord du vaisseau *Toronto* dont il était le maître. Le demandeur fit décerner contre lui un bref de *capias*. La déposition alléguait, comme raison de la croyance du déposant, que depuis la date dudit jugement le défendeur n'avait fait aucun effort pour le payer; qu'il était marin résidant en dehors de la province du Canada, mais temporairement dans le district de Montréal, d'où il devait repartir sous peu de jours pour retourner dans la Grande-Bretagne, sans avoir fait de provision pour le paiement de la réclamation du demandeur. Le défendeur fit motion pour faire casser le bref de

made by plaintiff, for the value of the goods, $80, is not a claim for unliquidated damages, and therefore an order from a judge, under C. C. P., art. 806, was unnecessary. Motion rejected. (14 *J.*, p. 218)

T. & C. C. DELORIMIER, for plaintiff.

CARTER & HATTON, for defendant.

INSURANCE AGAINST FIRE.

SUPERIOR COURT, Montreal, 4th March, 1869.

Coram TORRANCE, J.

O'CONNOR *vs* THE IMPERIAL INSURANCE CO.

Held: 1. That, although A is merely the agent of B, in obtaining from C an advance of money on certain goods, yet, if he render himself liable to C for any loss which might arise after the sale of the goods, he has an insurable interest in the goods, and can therefore legally insure them in his own name to the full extent of the loan.

2. An insurance, by simple receipt for the premium, is legal and binding without the issue of a policy, and the interest in the insurance money may be legally assigned by any simple form of transfer endorsed on the policy, and such transfer does not require the consent or acceptance of the insurance company to make it binding.

This was an action to recover the sum of $2,000, being the amount alleged to be insured by defendants, on coal oil, in "Middleton's coal oil warehouse n° 1." The insurance was effected on the 20th of June, 1867, in favor of "S. B. Heward," by the payment of the required premium to defendants' agents, in Montreal, and the granting of a receipt for the premium in the usual form, signed by such agents. Heward, at the time, was the holder of a warehouse receipt for the oil signed by Wm Middleton & Co., and of a note for $2,300, signed by the latter, payable to their own order and endorsed by them. Heward was in reality the broker of Wm Middleton & Co., and, as such, negotiated a loan from plaintiff, by way of advance on the oil, and delivered him the note, and assigned to him at the same time the warehouse receipt and the insurance receipt. The assignment of the insurance receipt was by endorsement thereon, as follows: "I hereby transfer the within policy of insurance to M. O'Connor." When Heward negotiated the advance from plaintiff, he did not en-

capias, alléguant que la cause de la dette avait pris naissance en pays étranger, et que les allégations de la déposition étaient insuffisantes, vagues et contradictoires. Cette motion fut rejetée, la cour jugeant la déposition suffisante. (*McDougall* vs *Torrance*, C.S., Montréal, 31 mai 1861, MONK, J., 5 J., p. 148, et 8 R. J. R. Q., p. 137)

dorse the note, but, by a separate writing, he rendered himself responsible to plaintiff for any deficiency which might occur, should the proceeds of the oil when sold prove to be insufficient. Middleton subsequently absconded, without paying the note, and, the greater part of the oil having been destroyed by fire, plaintiff sued to recover the insurance money covered by the receipt. At the argument, CARTER, Q. C., for defendant, contended that Heward had not, under circumstances, any insurable interest in the oil, and that the transfer of the insurance receipt was null for want of acceptance or consent on the part of defendants.

"The court, considering that defendants have failed to prove the material allegations of their pleas, doth dismiss the same; considering that plaintiff hath established in evidence the material allegations of his declaration, and, especially, that the oil, the value of which is sought to be recovered, existed on the 20th of June, 1867, and from that date to the date of the fire hereinafter mentioned, and that Stephen H. Heward had an insurable interest to the amount of $2,000 in the same, when he made the insurance referred to in the interim receipt; considering that, by article 2576 of the Civil Code, the insured has, in all cases, a right to assign the policy with the thing insured; considering that the contract of insurance made with defendants, on the 20th of June, 1867, and the property thereby insured against loss by fire by Heward, while he had said insurable interest in said oil, was, on the 20th of June aforesaid, for value, namely $2,000 and upwards, by him, with the property insured, transferred to plaintiff; considering that it is established in evidence that 425 barrels of the oil so insured were destroyed by fire, on the 17th of August, 1867, while the policy was in full force, and that plaintiff is entitled to the benefit thereof, and to recover from defendants the value of the said oil so insured by them against loss by fire; seing the said *retraxit* fyled by plaintiff, whereby he reduces his claim to the sum of $1587.76, with interest thereon from the 16th August, 1867, when the note fell due: It is, therefore, considered and adjudged that defendants do pay and satisfy to plaintiff the sum of $1587.76, with interest thereon from the 16th day of August, 1867." (14 *J.*, p. 219)

STRACHAN BETHUNE, Q. C., for plaintiff.

G. B. CRAMP, for defendant.

EDWARD CARTER, Q. C., counsel.

NOTE GIVEN BY AN INSOLVENT DEBTOR TO OBTAIN HIS DISCHARGE

COURT OF QUEEN'S BENCH, Montreal, 18th March, 1872.

Coram CARON, J., DRUMMOND, J., BADGLEY, J., and MONK, J.

AMABLE PRÉVOST *et al.*, plaintiffs in the Circuit Court, appellants, *and* ELIZABETH ANN PICKEL, defendant in the Circuit Court, respondent.

Held: That the note of a third party given by an insolvent to a creditor to obtain the creditor's consent to the discharge of the insolvent, is null and void.

This was an appeal from a judgment of the Circuit Court, at Montreal, of the 18th June, 1870, MACKAY, J. Here follow the remarks of the judge in the Circuit Court, and the judgment of the said court.

MACKAY, J.: The question at issue is whether a note of a third party given by an insolvent to a creditor to obtain his consent to the discharge of the insolvent can be considered good and its amount recovered. The Insolvent Act of 1864, 27-28 Vict., ch. 17, sec. 9, § 13, expressly says that such note given by the insolvent is null and void, but does not say anything particularly as to the note being the insolvent's note, or a third party's. The law of England does expressly mention third parties, and a note given by a third person to a creditor to procure him to consent to a bankrupt's discharge is null. So, in the law of France, since 1838; but, previous to that time, a note given by third parties could be sued for and its amount recovered by the creditor. But, here is the fact that it was the insolvent himself was brought this note to plaintiff, and it comes within the Insolvent Act expressly. The Act of 1865, 29 Vict., ch., 18, sec. 28, says: "If any creditor of an insolvent, directly or indirectly, takes or receives *from* such insolvent any payment, gift or gratification for consenting to his discharge, or composition, such creditor shall incur a penalty of three times the value of the payment, &c." The plaintiffs say that third persons are free to give notes to creditors, to get them to waive opposition to bankrupts' discharge. The case has to be judged upon the particular proof made in it, in other words, upon its particular merits. We see it a case of a third person's (defendant's) note received by plaintiffs *not from her* (they never spoke to her), but from her son, one of the insolvent firm of McDonell and Ste-Marie, taken by plaintiffs, *from him*, on terms that, for it, the plaintiffs would desist from opposing the insolvent's discharge. Under these circumstances, the court holds that the amount of the note

cannot be recovered by plaintiffs from defendant. There was clear illegality, under our Act of 1865, in plaintiffs' stipulating with the insolvent for this note, as they did, according to their receipt fyled. This illegality is fatal to plaintiffs. Smith, *on Contracts* (150).

Here follows the judgment: "Considering that, against plaintiffs' *prima facie* case, defendant has proved the material allegations of his pleas; considering that the title of plaintiffs to the note sued upon, was and is delivery of it by John D. McDonell, an insolvent, to them, upon and for which delivery plaintiffs agreed with McDonell, to discontinue their resistance or opposition to or contestation of his and Sainte-Marie's (his co-partner's) discharge under the Insolvent Act of 1864 and the Act amending it, which discharge plaintiffs would only allow in consideration of said note given to them, after obtaining which they did desist from their contestation of said discharge, and consent to said discharge; considering that, by sec. 28 of the Act of Parliament of 1865, 29 Vic., cap. 18, in force before and when plaintiffs contracted for and got delivery of said note, it is enacted that, if any creditor of an insolvent takes or receives directly or indirectly from him any payment, gift or gratuity, as a consideration to consent to the insolvent's discharge, such creditor shall forfeit a sum equal to treble the value of the payment, gift or gratuity so taken or received; considering that any contract made for or about any matter or thing prohibited or made unlawful by such section of the Act is a void contract; that plaintiffs' contract for the note sued upon, upon which contract they received from the bankrupt McDonell the said note, was and is void by law (*nommément*, by force of the commun law and said section 28 of said Act of 1865, 29 Vic., cap. 18); that the court ought not to help to give it any effect; that said note ought, upon the proofs made, to be held of no effect but illegal, and plaintiffs' suit incapable of being maintained against defendant, doth dismiss plaintiffs' action with costs, &c."

The plaintiffs appealed from this judgment, and the Court of Appeals confirmed it.

MONK, J., dissented, remarking that there was no proof that the other creditors were injured by the act complained of.

BADGLEY, J.: Saint-Marie and McDonell, traders, went into insolvency, under the Insolvent Act of 1864, 27-28 Vict., ch. 17, and amendments, and, when the time came for obtaining their discharge, appellants here and another creditor to a certain amount were opposed to the relief sought by them. In order to overcome the objection, arrangements were made between the opposing creditors and McDonell, one of the insolvents, the son of respondent, who was perfectly solvent, by which, in

consideration of her promissory note for the full amount of their respective debt, made by her in their favor, these opposing creditors agreed to waive their objections against the grant of the certificate of discharge and to consent to the same, and did in fact thereby subscribe their consent, as required by law, and, thereupon, the insolvents were discharged, the creditors remaining still on the list of proved claimants. The respondent refused payment of her note to appellants, pleading want of consideration for the note as well as the illegality of the transaction. There is no conflict about the facts of the case; the note is dated on the 2nd July, 1869; it was to her own order and endorsed by her and, by McDonell, delivered to appellants, and was without consideration from appellants to respondent, and was, moreover, given to and received by them under an express agreement between the creditor and the insolvent, for the purchase of the creditor's consent to forbear opposing and to consent to the certificate of discharge under the Insolvent Act of 1864 and its amendment of 1865. The contention rests upon the general policy of the insolvent law, and, specially, upon the section 28 of the Act of 1865, 29 Vict., ch. 18, which is in the following terms: "If any creditor of an insolvent, directly or indirectly, takes or receives from such insolvent, any payment, gift, gratuity, or preference, or any promise of, &c, as a consideration or inducement to consent to the discharge of such insolvent, or to execute a deed of composition and discharge with him, such creditor (*encourra une amende*), *shall forfeit* and pay a sum equal to treble the value of the payment, &c., so taken, received or promised, and the same shall be recoverable by the assignee, &c., and distributed as a part of the ordinary assets of the estate." This was plainly an amendment to sub-sec. 13, sec. 9 of the Act of 1864, 27-28 Vict., ch. 17, which provides "that every discharge or composition or confirmation of any discharge or composition, which has been obtained by fraud or fraudulent preference, or by means of the consent of any creditor procured by the payment of such creditor of any valuable consideration for such consent, shall be null and void." The provision of 1864 operates upon the insolvent, whilst that of the amending Act operates upon the contracting creditor. Now, the argument of appellants is that the contract is not an illegality, as regards respondent, because the estate of the insolvent has not been lessened or interfered with, and the only consequence is appellants being liable and subjected to pay to the estate of the insolvent three times the amount of the debt so secured. In other words, that the distinction avails in their favor here, between an act directly prohibited by a statute and one the doing of which merely subjects the party to a penalty. In the

former case the note would be vitiated, in the latter not. Now, it is quite true that parties as a general rule make what contracts they please, and become subject to their fulfilment unless the Legislature, from motives of public policy or revenue, or other public grounds, shall interdict them. The insolvent law has been specially enacted, not for the benefit of the insolvent alone, but upon grounds of public good faith and mercantile honesty to protect all his creditors, to prevent frauds, preference of some to the detriment of others, and to keep the insolvent himself, as well as his creditors, in the same relative position towards each other as his insolvency has fixed him. Amongst the privileges of the insolvent law is the important one of the insolvent's discharge by the consent of his creditors, or of a certain proportion in number and value, which necessarily presupposes consenting creditors uninfluenced by mercenary or immoral motives as regards their co-creditors upon the estate, otherwise, one or two influential creditors, by compelling the friends of the insolvent to yield to their extortions, might control the certificate altogether to the disadvantage of the remaining creditors. Such acts convert the insolvent law from its fair and honest beneficial object into a means of commercial immorality, and a contravention of public policy, by securing preferences for the payment of debts in full. The agreement was here entered into for the purpose of enabling a party to infringe a law made for the protection of commercial morality and the exclusion of enforced and extorted preferences in commercial insolvencies. It is the infraction of a law made for the protection of public morals and prevents the appellants from having a *locus standi* in a court of law to enforce such an agreement. This has always been the principle in the law of bankruptcy and insolvency. As, *e. g.*, to induce a petitioning creditor not to prosecute a fiat in bankruptcy. *Davis* vs *Holding*, 1 Meeson and Welby's Rep., p. 159, and *Goodered* vs *Armour*, 12 Law Journal, *Michaelmas Term*, p. 56; or to induce a creditor to sign a bankrupt certificate, imperial statute 6 Geo. 4, ch. 16, s. 125,—or to sign a composition deed, *Knight* vs *Hunt*, 5 Bingham's Rep., p. 432. The infliction of the penalty contemplates the prohibitory intent against such contract by the Legislature, and no action will lie for an act done prohibited by a penalty. See 14 Meeson and Welsby's Rep., p. 450; 10 Bingham's Rep., p. 110, and 5 Bingham's New Cases, p. 85. In the case of *Ritchie* vs *Smith*, 6 Common Bench Rep., p. 462, these questions were discussed at length, and it was held by MAULE, J.: "That although, in terms, in that case, the agreement was enabling a party to contravene a law of public morals and policy, and the act contemplated to be done was not expressly

and in terms prohibited by the statute, there could be no doubt that it was an illegal act and that the agreement was void. The cases as to matters contrary to public policy directly apply. If two parties enter into an agreement whereby it is stipulated that one of them shall be enabled to commit an act that is contrary to public policy, and contrary to the provisions of an Act of Parliament, though not expressly prohibited except by the imposition of a penalty, the agreement is clearly illegal and void." WILLIAMS, J., is of the same opinion. Now here the action is between the parties to the note, given without consideration, and for the illegal purpose of enabling or inducing the same thing, the appellants to contravene and evade the statute by doing an act subject to a penalty imposed upon them for contravening the provisions of the insolvent laws. *Ex dolo malo* or *ex turpi causa non oritur actio.* The general principal is, if an act be prohibited under a penalty, a contract to do it is made void. There can be no doubt of the contract in this act, inasmuch as one of the appellants under oath admits that the note was received by them through McDonell, for the discharge in question, and consented to it. The judgment dismissing the action was therefore correct and must be confirmed. Judgment confirmed. (14 *J.*, p. 220; 17 *J.*, p. 314; 2 *R. C.*, p. 231, et 14 *R. L.*, p. 204)

DUHAMEL & RAINVILLE, for the appellants.

ROBIDOUX, for the respondent.

RENONCIATION A SUCCESSION.

SUPERIOR COURT, Montreal, 29th November, 1873.

Coram TORRANCE, J.

MULHOLLAND *et al. vs* HALPIN *et al.*

Held: That heirs-at-law against whom it is sought to make a judgment executory must pay costs up to the date of renunciation.

PER CURIAM: This is an action against John Halpin and William Halpin to have declared executory against them a judgment obtained by plaintiffs against the deceased father of defendants. The defendants pleaded that their father, at his death, on the 26th June, 1872, was completely insolvent; that defendants did not deem it advisable formally to renounce his succession, inasmuch as he left no property, but it is untrue that they accepted his succession expressly or tacitly; that they never put themselves in possession of any of the

property of the said succession, and never took the quality of heirs, and never did any act which could induce the supposition that they intended to take the quality of heirs. Issue was joined on this plea and, after the adduction of evidence, the cause was placed on the roll for hearing on the merits on the 18th October last. On that day, defendants fyled in court a declaration that they renounced the succession of their father. The court on the examination of the record does not find that there is proof of a meddling with the estate of the deceased, which, in view of the renunciation produced, would fasten upon defendants a liability to pay the debts of the deceased. They may always renounce *rebus integris*, so long as they have not " fait acte d'héritier." The action against defendants must, therefore, be dismissed ; but a question remains to be settled as to the payment of the costs of this action. Guyot, Répertoire, verbo *Renonciation*, p. 136, 2nd col., says: " Les dépens faits jusqu'au jour où la renonciation est représentée doivent être supportés par l'héritier, attendu qu'il les a occasionnés par son retard à remplir l'obligation où il était de prendre qualité dans le temps fixé par la loi." This principle was recognized in the *Montreal City and District Building Society* vs *Kerfut et al* (1). While, therefore, the court dismisses the action, the costs will be paid by the defendants. (17 *J.*, p. 318, et 5 *R. L.*, p. 184)

M. TAIT, for plaintiffs.

ARCHAMBAULT, for defendants.

(1) Une action intentée contre un héritier qui n'avait pas renoncé à la succession et qui comparaît et plaide une renonciation ultérieure à l'introduction de la demande, sera rejetée, mais cet héritier devra payer les frais de contestation. (*Société de construction du district et de la cité de Montréal* vs *Kerfut et al.*, C. S., Montréal, 30 novembre 1859, BERTHELOT, J., 4 J., p. 54)

APPEL.

COURT OF QUEEN'S BENCH, Montreal, 8th June, 1869.

Coram DUVAL, C. J., CARON, J., BADGLEY, J., MONK, J.

JOSEPH OCTAVE HYACINTHE DIT BELLEROSE, defendant in the court below, appellant, *and* HENRY HART, plaintiff in the court below, respondent.

Held: That in an action of damages for $200 for a *voie de fait*, in which judgment was given against the defendant for a sum of $10 by the Court of Review, with costs as in an appealable action for $120, there is no appeal by the defendant from such judgment to the Court of Queen's Bench. (1)

The plaintiff brought an action, in the Circuit Court for the district of Richelieu, to recover from defendant $200, for damages for a *voie de fait*. The action was dismissed by the Circuit Court on 4th April, 1868, LORANGER, J., but the judgment was reversed by the Court of Review (MONDELET, J., BERTHELOT, J., MACKAY, J., which gave judgment, on the 21st November, 1868, in favour of plaintiff for $10, and costs as in an appealable action for $120. The judgment in appeal was as follows: "The court, considering that, by the judgment from which this appeal is brought, pronounced by the Court of Revision, sitting at Montreal on the 21st of Nov. 1868, defendant is condemned to pay to plaintiff a sum of $10 with interest and costs, and that from the said judgment appellant was not entitled, by law, to institute an appeal, it is considered and adjudged, by this court, that the present appeal be and the same is hereby dismissed with costs, &c." (14 *J.*, p. 223 ; 1 *R. L.*, p. 157, et 1 *R. C.*, p. 231)

A. GERMAIN, for appellant.

ARMSTRONG & GILL, for respondent.

(1) Lorsque le montant du jugement n'excède pas $100, quoique le montant demandé excédât cette somme, il n'y a pas lieu à la revision de ce jugement, si le créancier se contente du jugement rendu. (*Lefebvre* vs *Murdoch*, C.S.R., Montréal, 30 novembre 1869, MONDELET, J., BERTHELOT, J., MACKAY, J., 13 J., p. 328, et 19 R. J. R. Q., p. 434)

Quære, are these decisions not a departure from C. S. L. C., cap. 77, s. 25, and cap. 82, s. 2, and C. C. P., art. 1142.

JURISDICTION.

COURT OF REVIEW, Montreal, 25th April, 1870.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

MCGINNIS *vs* HORSEMAN.

Held: That the Circuit Court has no jurisdiction to grant the resiliation of a lease where the rent or annual value exceeds two hundred dollars, though the amount of damages claimed be under $200.

The action was instituted by plaintiff, in the Circuit Court, under the Lessors and Lessees Act, alleging damages caused by defendant to the premises leased by him from plaintiff, under a notarial lease, at a rental of $240 per annum. Conclusions for the resiliation of the lease, ejectment of defendant, and for $119 damages alleged to have been suffered by plaintiff. The defendant fyled a declinatory exception, on the ground that the Circuit Court had no jurisdiction to grant the resiliation of a lease for a sum exceeding $200 per annum. The defendant referred to art. 887 C. C. P., and contended that where there was a demand for the resiliation of the lease, and the annual rent was over $200, the action must be instituted in the Superior Court, even though the amount of damages claimed was under $200. This exception was maintained by the Circuit Court.

The following was the judgment of the Circuit Court, BERTHELOT, J., 29th March, 1870: "La cour, considérant que le bail dont le demandeur demande la résiliation, à l'encontre du défendeur, a été fait et consenti pour £60 par année, et que, pour cette raison, la demanderesse, conformément à l'art. 1105 C. P. C. et la loi du pays, aurait dû se pourvoir au terme supérieur de cette cour; a maintenu ladite exception et renvoie l'action de la demanderesse avec dépens, etc."

The plaintiff inscribed in review and urged that, inasmuch as the amount of damages prayed for was only $119, he was obliged to sue in the Circuit Court. See 25 Vict., cap. 12, sec. 1. The plaintiff argued: If we cannot join an action for resiliation, why should there be a special clause in the law? We all know that an action for rent or an action for damages alone must be taken in the Superior or Circuit Court, according to the amount of rent or damages claimed, and, also, that such an action purely and simply for damages or rent cannot come under the operation of the Lessors and Lessees Act; but must be taken out under the common law. It was the practice, since the 25th Victoria, to keep down the costs on actions of ejectment by conjoining a demand for a small amount of damages.

MACKAY, J : The court is unanimously of opinion to confirm the judgment. The Circuit Court has no jurisdiction to grant the resiliation of a lease, where the rent or annual value exceeds $200. Judgment confirmed. (14 *J.*, p. 226)

F. A. QUINN, for the plaintiff.

JOHN MONK, for the defendant.

SAISIE CONSERVATOIRE.—UNPAID VENDOR.

CIRCUIT COURT, Montreal, 2nd April, 1870.

Coram TORRANCE, J.

LAVOIE *vs* CASSANT, *and* CLENDINNING, mis en cause.

Held : That a *saisie conservatoire* by an unpaid vendor, for cash, of stones placed on the land of a third party for whom the purchaser is building a house will be upheld after eight days from delivery to purchaser, unless the third party proves a sale to and payment made by himself to purchaser.

TORRANCE, J. : This action began with a *saisie conservatoire*, to attach, in the hands of defendant, 7 stones which plaintiff had sold him for cash, about the end of October, but which had not been paid for. The declaration alleged that defendant was about to employ the stones in the construction of houses for William Clendinning and one Muldoon. The declaration prayed that defendant might be condemned to pay plaintiff $36, as the price of the stone, that the stone be sold according to law, to pay the said sum, that plaintiff be declared to be privileged on the price of the stone, and, finally, that Clendinning and Muldoon be summoned to hear the attachment declared good and valid. The defendant made default. William Clendinning answered the demand, and alleged that the stones were his property and built into his house, and furnished to him by defendant under his contract to build his house, and were paid for before the issue of the writ, and that plaintiff has no claim to the same. The evidence is that the stones were worth about $30, and were sold and delivered to defendant, at least eight or ten days before the seizure, which was made on the 25th of November, when the stones were on the ground of Clendinning, ready to be placed in the building. There is no proof of payment by Clendinning at the time of the seizure. The plaintiff has cited C. C., art. 2000, as in his favour. The court would refer to C. C., art. 1999, which says that the attachment of the thing sold by an unpaid vendor must be made within

eight days, as regards a third party who has paid for it. Then C. C., art. 2000, says if the thing be still in the same condition, but the vendor be no longer within the delay, he has a like privilege upon the proceeds, except as regards the lessor or the pledgee. Seeing that the third party, Clendinning, has not proved payment by him for the stones before the seizure, the court holds that plaintiff, as unpaid, vendor, has a privilege even after the eight days. Judgment for plaintiff. (14 *J.*, p. 225)

DUGAS, for plaintiff.

A. & W. ROBERTSON, for defendant.

VENTE D'IMMEUBLES PAR CORPORATIONS MUNICIPALES.

COUR DU BANC DE LA REINE, EN APPEL,

Québec, 19 mars 1870.

Coram DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

LA CORPORATION DU COMTÉ D'ARTHABASKA *et al.*, appelantes, *et* JAMES BARLOW, intimé.

Juge :—1. Que la 11e sect. de la 27e Vict., chap. 9, n'éteint pas l'action en dommages après les deux ans à compter de la vente par adjudication en vertu de l'acte municipal; la corporation est toujours tenue aux dommages, lorsque les formalités dans les ventes d'immeubles en vertu de l'acte municipal n'ont pas été observées, et telles ventes seront déclarées nulles

2. Si la corporation ne justifie pas les procédés ou ne plaide pas erreur avec offre d'indemniser l'adjudicataire de bonne foi, ce dernier sera maintenu dans son adjudication et la corporation condamnée seule aux dommages et intérêts envers la partie lésée.

James Barlow était le propriétaire du lot n° 14, rang 8, du canton de Stanfold, qu'il avait acheté du shérif pour le district d'Arthabaska le 13 octobre 1862. Enregistré le 28 mars 1863. Le 30 mars 1864, Barlow vendit la moitié N.-E. de ce lot à Jérémie Demers, par acte devant F.-X. Pratte et son confrère, notaires, par $600, avec intérêt. Le conseil de la municipalité du canton de Stanfold avait fait vendre ce lot de terre pour taxes, le 2 février 1863, par la corporation du comté d'Arthabaska, dont Edward-J. Charlton, un des défendeurs dans la cause, devint l'adjudicataire, pour $4, et, le 10 février 1865, la corporation du comté d'Arthabaska lui en donna acte de vente. Par son action, Barlow demandait : 1° Que cet acte fut annulé, parce que la vente avait été faite illégalement par les deux municipalités. 2° Que, dans le cas

où l'acte de vente ne serait pas annulé en raison des illégalités qui avaient été commises par les deux corporations, qu'elles fussent condamnées, solidairement, à lui payer $1200 de dommages et intérêts, pour lui tenir lieu et place dudit lot de terre, et le rembourser de la créance que lui devait Jérémie Demers, qui était perdue par l'acte illégal des corporations. Barlow, pour justifier sa demande contre la corporation du canton de Stanfold, disait: 1° Que le conseil de la municipalité du canton de Stanfold n'avait jamais passé de règlement imposant une taxe de trente centins sur ledit lot de terre, et la corporation du canton de Stanfold n'a pu prouver l'existence de ce règlement (*Blackweil, on Tax Titles*, pages 70, 71, 73, 75). 2° Que le conseil municipal n'avait pas le droit de faire vendre ce lot de terre pour une autre somme de $1.00 (une piastre), pour prétendus travaux faits, dans l'intérêt de Barlow; il fallait un jugement au préalable condamnant Barlow à payer cette somme (24 *Vic., chap.* 29, *sects* 19 et 20). 3° Que ce lot de terre ne pouvait être vendu pour taxes dues aux commissaires d'école, montant à $1.64, les commissaires d'école n'ayant jamais fait de règlement imposant telle taxe, et la corporation du canton de Stanfold n'a pu produire ce règlement. L'Acte des S. R. B. C. de 1861, chap. 15, sect. 85, règle la manière dont les taxes scolaires seront prélevées par les conseils municipaux (*Blackwell, pages* 60, 61, 63, 65). 4° Barlow possédait des meubles exploitables, dans le canton de Stanfold, valant au-delà de £100; ainsi la corporation devait, au préalable, faire exécuter ses meubles; elle n'avait le droit de faire vendre ce lot de terre qu'après l'exécution et vente des meubles (*Blackwell, pages* 62 *et* 63; *S. R. du B. C., chap.* 24, *sect.* 59, §§13, 14, 15, 16, *pour taxes municipales*; 27 *Vict., chap.* 11, *sects* 1 *et* 2, *pour taxes scolaires*), ce qu'elle n'avait pas fait. La corporation du comté d'Arthabaska n'avait pas le droit de vendre ce lot de terre, pour les raisons suivantes, savoir: 1° Parce que le secrétaire-trésorier du conseil de la municipalité du comté d'Arthabaska n'avait pas donné *avis public* de la vente, ainsi que voulu par la loi (*S. R. B. C., chap.* 24, *sect.* 59, §§21 *et* 22, *et sect.* 6, §§1, 2, 3, 4, 5 et 6.) 2° Parce que la mise en vente n'avait pas été annoncée et publiée dans les journaux, ainsi que voulu par la loi (*S. R. B. C., chap.* 24, *sect.* 59, §21). 3° Parce que la vente, par adjudication, n'avait pas été faite au lieu ordinaire des séances du conseil municipal du comté d'Arthabaska (*Idem, chap.* 24, *sect.* 59, §21). 4° Parce que la corporation du comté d'Arthabaska a vendu ledit lot de terre pour $4, quand elle n'avait à prélever que $2.94. 5° Parce que Théophile Côté, qui avait vendu ledit lot de terre, n'avait jamais été nommé secrétaire-trésorier du conseil de la municipalité du comté

d'Arthabaska, et que, par conséquent, cette vente n'avait pu être légalement faite (*Blackwell, on Tax Titles, page* 91). Les corporations et Charlton se sont défendus séparément ; ils disaient que l'action du demandeur était limitée et prescrite par la 27ème Victoria, chap. 9, sect. 11, par deux années, à compter de l'adjudication du 10 février 1863, et que ce délai était expiré lorsque l'action avait été intentée ; qu'elle devait être renvoyée, avec les dépens, le demandeur n'étant plus en temps utile pour intenter son action.

La Cour Supérieure, présidée par le juge POLETTE, a maintenu cette défense et a débouté le demandeur de son action par son jugement du 27 décembre 1867.

Barlow, se croyant lésé par ce jugement, inscrivit sa cause devant la Cour Supérieure, à Québec, siégeant en revision. Barlow disait : Cette loi dit que, pour faire annuler *une vente*, l'action devra être intentée dans les deux ans qui suivront *l'adjudication*. Or la vente ne se fait que deux ans après l'adjudication (S. R. du B. C., chap. 24, sect. 61, §11). Comment peut-elle être prescrite avant d'être née, avant d'avoir été exécutée ? Il suffit d'examiner l'acte municipal pour faire disparaître cette prétendue difficulté. Le mot *adjudication* est un *lapsus plumæ* du législateur ; il a voulu dire *vente*, et que la limitation d'action ne devrait compter que deux ans après l'acte de vente. La vente par adjudication ne donne que la saisine et la possession de l'immeuble à l'adjudicataire : *jus ad rem* et non pas *jus in re* (*S. R. du B. C., chap.* 24, *sect.* 61, §4). Pendant la première année, il ne pourra y couper du bois, c'est-à-dire défricher (*Idem*, §5). L'adjudicataire n'en est possesseur qu'à titre précaire, toujours obligé à en remettre la saisine et la possession au propriétaire, lorsque ce dernier lui remboursera le prix d'acquisition, avec vingt par cent en sus (*Idem*, §6), et cela sans forme de procès, même pendant la deuxième année de sa possession, et le premier individu venu peut déposséder cet adjudicataire, même sans la permission du propriétaire [*Idem*, §§7, 8 et 9] ; cet adjudicataire a moins de droit à la propriété que le *squatter* qui, après la possession de l'an et jour, peut exercer la *complainte*, lorsqu'il est troublé. Il est donc clairement démontré que l'adjudication n'est pas une vente. Si cela n'est pas encore suffisamment démontré, nous avons d'autres preuves dans l'Acte municipal. Si, à l'expiration de deux années, le propriétaire ne paye pas, la corporation du comté *passera* un contrat de vente à l'adjudicataire [*Idem*, §11], et ce contrat sera un titre *translatif* et *transférera* à l'adjudicataire non seulement tous les *droits* du *propriétaire* primitif, mais aura l'effet de *purger* ce bien-fonds de tous *privilèges et hypothèques quelconques* dont il pourra être *grevé*. Or, la vente pour taxe municipal est considérée comme vente

judiciaire par autorité de justice comme faite par le shérif. Mais, jusqu'à cet acte de vente, au nom de la corporation du comté, il n'y a pas eu de titre translatif de la propriété. Donc l'adjudication n'est pas la vente indiquée et mentionnée dans la loi, puisqu'elle ne purge pas les *privilèges et hypothèques.* Donc la limitation d'action ne doit commencer à courir qu'après la naissance de l'acte de vente, et il ne peut être sujet à la prescription avant d'avoir été fait, avant d'avoir vu le jour. Donc la limitation d'action mentionnée dans l'acte de la 27e Victoria, chap. 9, sect. 11, ne commence à courir que du jour auquel l'acte de vente translatif de la propriété a été fait. Si cette interprétation ne peut lui être donnée, cette disposition de la loi n'est pas applicable au cas actuel ; s'il y a une limitation d'action, elle ne peut être que pour les droits conférés à l'adjudicataire par l'acte d'adjudication, et non des droits que lui a transférés l'acte de vente qui n'existait pas encore [Blackwell, page 301]. Cette limitation d'action peut-elle être invoquée par les corporations défenderesses ? Non. La loi, si elle est applicable au cas actuel, ne serait faite que pour favoriser les droits de l'adjudicataire, mais ne limite ni ne prescrit l'action pour dommages qu'avait le demandeur contre les corporations défenderesses, pour lui avoir ravi injustement sa propriété. Si le défendeur n'avait pas voulu plaider limitation d'action, les corporations pouvaient elles la plaider pour lui ? Non. Donc la limitation d'action ne peut profiter qu'au défendeur.

Les corporations représentées par William Duval et l'adjudicataire représenté par J.-B. Parkins, Q. C., répondaient au demandeur : The present action having been brought nearly four years after the adjudication, and three years and a half after the passing of the act, how does plaintiff expect to escape from its operation ? To do so, he says : Adjudication does not mean adjudication, but it means something else ; it means the final execution of the deed of sale which took place 2nd Feby, 1865, and I am within time from that date. The first rule is that, where the language of a statute is clear and not susceptible of doubt or two interpretations, it must be literally complied with, notwithstanding an inconvenience, injustice or even absurdity which compliance will entail ; it is the *sic volo* of the legislature. Now, what word has a clearer signification than *adjudication ;* its legal signification, as well as that of its co-relative *adjudicataire,* are technical. Its signification, in common parlance identical with its legal signification, is known to every auctioneer, merchant and man of business in the land. No two ideas can be entertained about it. Is the intention of the Legislature to make the time of prescription run from the

adjudication, and not from the *execution* of the deed of sale unreasonable ? Is it not rather consonant with justice and common sense that the two years from the adjudication during which the owner is *en demeure* to redeem his land should be also employed by him to test the validity of the proceedings against him, if he felt aggrieved, and that, at the end of that period, the purchaser should have his title clear, and not a title which he could neither dispose of in the market, nor personally use be applying himself to the cultivation and improvement of his land ? Is it consistent with public morality and the policy of the M. and R. Act that so many purchasers of land deriving their title from law and public authority, should be condemned to two years of enforced idleness with a useless piece of paper in their pocket, which they commonly dispose of to speculators ? That the two years of suspended proprietorship should be extended to four, nothing would be more surely calculated to defeat the operation and intention of the law colonisation than such a state of things.

La Cour Supérieure, en Revision, prononça le jugement suivant : " La cour, considérant qu'il y a eu erreur dans ledit " jugement, quant à ce qui concerne les défendeurs, la corpo- " ration du comté d'Arthabaska et la corporation du canton " de Stanfold ; considérant que le demandeur se plaint, par sa " déclaration, que le lot de terre numéro quatorze, dans le " huitième rang du canton de Stanfold, qu'il avait acquis du " shérif d'Arthabaska, par acte du treize d'octobre 1862, a été " illégalement adjugé et vendu, le deux février 1863, par le " secrétaire-trésorier du conseil municipal du comté d'Artha- " baska, à Edward-J. Charlton, l'un des défendeurs, à l'instance " de la corporation du canton de Stanfold, l'une des parties " défenderesses, pour cotisations municipales et prix de tra- " vaux faits sur ce lot de terre, ainsi que pour cotisations d'é- " cole, dans ce même canton ; que, le dix février 1865, un acte " de vente de cette adjudication dudit lot de terre a été con- " senti par ledit secrétaire-trésorier audit Charlton ; qu'il n'y " avait pas eu de cotisations municipales ni d'école d'imposées " sur ce lot de terre, et qu'il n'en était pas dues, non plus que " la somme réclamée pour de prétendus travaux, et que, pour " ces raisons et autres déduites en la déclaration, la corpora- " tion du canton de Stanfold n'avait pas le droit de faire vendre " le lot de terre, ni la corporation du comté d'Arthabaska, " aussi partie défenderesse, le pouvoir de faire cette vente ; et " conclut à la nullité de l'acte de vente ainsi consenti par le " secrétaire-trésorier à Charlton, le dix février 1865, à ce " que Charlton remette la possession dudit lot de terre, et " enfin à ce que la corporation du canton de Stanfold et la

" corporation du comté d'Arthabaska soient condamnées soli-
" dairement à lui payer la somme de douze cents piastres de
" dommages-intérêts et les dépens; considérant que, par leurs
" défenses à la demande, les défendeurs ont plaidé qu'il s'est
" écoulé plus de deux ans depuis le deux février 1863, date
" de ladite adjudication et vente, même depuis la passation
" du statut de la vingt septième année du règne de Sa Majesté,
" chapitre neuf, jusqu'au seize janvier 1867, jour que l'ac-
" tion en cette cause a été intentée, et qu'ainsi cette action est
" prescrite et éteinte ; considérant 1° Qu'il est établi que le-
" dit lot de terre a été adjugé et vendu le deux février
" 1863 par le secrétaire-trésorier du conseil municipal du
" comté d'Arthabaska audit Charlton, à l'instance de la
" corporation du canton de Stanfold, pour des cotisations
" municipales qu'elle prétendait lui être dues, ainsi que pour
" prix de travaux faits ou prétendus faits sur ce lot de terre,
" et pour cotisations d'écoles dans ce même canton, et que,
" le dix février 1865, ledit secrétaire-trésorier en a consenti
" acte de vente audit Charlton, le tout en vertu de l'Acte
" municipal refondu du Bas - Canada, ch. 24, section 61 ;
" 2° Qu'il s'est écoulé plus de deux ans depuis le 2 février
" 1863, que ledit lot de terre a ainsi été adjugé et vendu
" audit Charlton et même depuis la passation de l'Acte passé
" dans la vingt-septième année du règne de Sa Majesté, cha-
" pitre neuf, intitulé : " Acte pour amender de nouveau l'Acte
" municipal du Bas-Canada, chapitre vingt quatre des Sta-
" tuts Refondus pour le Bas-Canada," jusqu'au seize janvier
" 1867, jour que l'action en cette cause a été intentée ; 3° Que,
" suivant l'esprit et la lettre même de cet Acte, le délai de
" deux années pour suivre la nullité de la vente, de même que
" pour permettre au propriétaire primitif de racheter son bien
" vendu, en payant le montant prélevé avec vingt pour cent
" en sus, suivant ledit Acte municipal refondu du Bas-Canada,
" ch. 24, section 61, paragraphe 6, court depuis le jour de
" l'abjudication et vente et non depuis la date de l'acte de
" vente que le secrétaire-trésorier consent au nom de la corpo-
" ration du comté à l'adjudicataire ; qu'il résulte de ce qui
" précède que l'action du demandeur aurait due être intentée
" dans les deux ans qui ont suivi la passation dudit Acte de
" la vingt-septième année du règne de Sa Majesté, chapitre
" neuf, attendu que l'adjudication et vente avait eu lieu avant
" cet Acte, tandis qu'elle n'a été intentée qu'après l'expiration
" de deux années depuis ce même Acte, qu'ainsi elle est éteinte
" quant à ce qui concerne l'adjudicataire Charlton, seulement ;
" la cour, revisant le jugement rendu et rendant le jugement
" qui aurait dû être rendu, déboute le demandeur de son action
" quant audit Charlton, avec dépens encourus en cour de

" première instance seulement contre le demandeur et non " encourus sur la présente revision, dont le demandeur " supportera la portion par lui encourue ; considérant que, " quant aux autres dits défendeurs, savoir la corporation " du comté d'Arthabaska et la corporation du canton de " Stanfold elles sont garantes des irrégularités et des illé- " galités qui ont précédé et accompagné la saisie et vente du- " dit lot de terre, lesquelles irrégularités et illégalités sont la " suite de négligence et de faute grossière de leur fait, et " qu'en autant elles ne peuvent invoquer en leur faveur " la prescription de deux ans écoulée depuis l'adjudication " susdite ; considérant que le demandeur souffre éviction de " la moitié du côté Sud-Ouest du lot en question, laquelle " moitié est prouvée valoir six cents piastres ; considérant " que, quant à l'autre moitié dudit lot, elle est en la posses- " sion de Jérémie Demers, du canton de Stanfold, cultiva- " teur, lequel n'est pas en cause, et qu'il n'est pas encore " dépossédé de la moitié dudit lot, et qu'il est inopportun, " quant à présent, d'adjuger quant à ladite moitié dudit lot, " ainsi en possession de Demers ; la cour condamne lesdites " deux corporations, conjointement et solidairement, à payer " au demandeur la somme de six cents piastres de dommages " par lui soufferts et lui résultant de la perte de la moitié " Sud-Ouest dudit lot de terre, avec intérêt à compter du " vingt-sept décembre 1867, date du jugement soumis à la " revision, et les dépens tant en cour de première instance " que ceux de revision, réservant au demandeur son recours " en temps et lieu et de la manière qu'il avisera, pour tels " dommages qu'il peut avoir éprouvés et qu'il pourra éprouver, " par suite de telle expropriation, que Demers pourrait avoir " éprouvés ou pourrait ci-après éprouver, de la moitié Nord- " Est dudit lot de terre. L'honorable juge Stuart *dissentiente.*"

Les corporations défenderesses interjetèrent appel de ce jugement.

CARON, J. : Barlow est propriétaire d'un lot de terre ; il vend à Demers la moitié, $600 qui ne lui sont pas payées, *bailleur de fonds ;* Barlow garde l'autre moitié valant $600. Pour taxe scolaire et ouvrage de route fait sur le lot, la municipalité de Stanfold demande et celle du comté d'Arthabaska fait faire la vente par encan de la totalité du lot, la moitié de Demers, comme celle restée à Barlow ; Charlton, l'un des défendeurs, adjudicataire pour $4 [le lot valait $1200].—Action par Barlow contre la municipalité de Stanfold et du comté d'Arthabaska, et aussi contre Charlton, pour faire déclarer nulle la vente faite à Charlton de la moitié, et se faire lui, Barlow, remettre en possession de la moitié adjugée à Charlton, et aussi en dommages pour, en faisant vendre la moitié de

Demers, avoir privé Barlow de son privilège de bailleur de fonds pour $600. Barlow dit en son ation : " Remettez-moi la moitié vendue à Charlton, et payez-moi la somme de $600 que me doit Demers, si non, payez-moi $1200 de dommages me résultant 1° de la moitié vendue à Charlton, si elle ne m'est pas remise, et 2° pour la perte de mon privilège de bailleur de fonds sur la moitié de Demers. Que les formalités voulues [les avis, annonces, etc.] n'aient pas été suivies, c'est admis et prouvé même de la part des deux corporations [Stanfold et Arthabaska] qui ont plaidé ensemble et la même chose, et aussi de la part même de Charlton qui a plaidé seul, la même défense ; il est prétendu que, tout en admettant le défaut de formalités allégué, et la nullité en résultant, le demandeur, lorsqu'il instituait son action, n'était plus à temps de le faire, son droit étant périmé et prescrit d'après l'Acte 27 Vic., chap. 9, sect. 11, qui, interprété à la façon des défendeurs, soustrait tant les municipalités que les adjudicataires à tout recours que peuvent avoir les propriétaires ou autres intéressés dans les immeubles vendus en paiement de taxes et cotisations, si ce recours n'est exercé dans *deux* années à compter du jour de l'adjudication. Dans l'espèce, plus de deux ans s'étaient écoulés depuis l'adjudication, lorsque le demandeur a porté sa présente action, laquelle, partant, pour cette simple raison, devait être renvoyée, aussi bien quant aux municipalités que par rapport à l'adjudicataire Charlton. Le juge Polette, siégeant en première instance à Arthabaska, a accueilli cette double prétention des défendeurs et a débouté le demandeur de son action, qu'il a déclarée périmée et éteinte aux termes de la clause citée plus haut. Le jugement soumis à la Cour de Revision (STUART, TASCHEREAU et BOSSÉ, JJ.) a été modifié par TASCHEREAU, BOSSÉ, STUART, dissident, de manière à admettre la prescription invoquée à l'égard de l'adjudicataire Charlton, à l'égard duquel l'action de Barlow a été renvoyée avec dépens, tandis qu'elle a été maintenue pour partie quant aux corporations à l'égard desquelles la prescription du statut est déniée. Il était prétendu, dans les motifs du jugement, que les municipalités sont *à toujours* responsables et garantes envers les parties qui souffrent de l'inexécution des devoirs et de l'abus des pouvoirs conférés et imposés à une corporation qui n'ont pas droit d'invoquer la prescription du statut, accordée aux adjudicataires de bonne foi, ou autres intéressés qui n'ont pas participé aux fautes commises par les municipalités. En conséquence ce jugement, en renvoyant l'action de Barlow contre Charlton, avec dépens, condamne les deux municipalités à payer à ce dernier $600, étant la valeur de la partie de son lot qu'il perd, puisque Charlton ne peut pas en être dépossédé ; mais, quant à l'autre moitié, celle vendue à Demers, sur

laquelle Barlow n'a qu'un droit hypothécaire pour le paiement d'une somme dont il n'est pas encore question, le jugement, sans statuer à cet égard, préserve à Barlow tous droits qu'il peut ou pourra avoir d'après les circonstances. Tel est la nature et le résumé du jugement dont est appel. La dernière partie, celle qui réserve à statuer sur la moitié de Demers, me paraît juste et correcte, surtout parce que Demers n'est pas en cause, et aussi parce que rien ne constate l'état où en est le paiement pour lequel cette partie du lot est hypothéquée. Quant à la partie du jugement qui renvoie l'action à l'égard de l'adjudicataire, je la regarde comme correcte, la clause du statut sur laquelle cette partie du jugement est fondée me paraît exonérer complètement l'adjudicataire de bonne foi, de tous recours pour nullité ne procédant pas de son fait, qui ne sont pas exercés pendant les deux années. S'il agit de bonne foi, il n'a pas à s'inquiéter si les formalités ont été suivies ; il peut et doit présumer qu'elles l'ont été, surtout si celui qui a intérêt à dire le contraire, le propriétaire, ne s'est pas présenté dans deux ans. Le fait prouvé que Barlow vivait sur les lieux, fait supposer qu'il savait que son lot avait été vendu. Dans ce cas, pourquoi ne pas se plaindre dans les deux ans. Charlton a donc justement été déchargé de l'action. Mais, quant à la partie du jugement, qui, tout en déniant aux municipalités le bénéfice de la prescription de deux ans qu'elles invoquent, les condamne à payer à Barlow la somme de $600, étant la valeur de la moitié du lot qu'elles lui ont fait perdre, en la vendant à Charlton, injustement et illégalement, comme dit plus haut, elle est, suivant moi, juste et légale en tous points. La clause du statut ne saurait être interprétée de manière à exonérer les corporations des délits qu'elles commettent au préjudice des tiers qui, par le fait des corporations et par le défaut des formalités voulues par la loi, sont exposés à n'avoir pas été informés des ventes de leur immeuble, que l'on faisait ainsi clandestinement à leur préjudice. La position de ceux qui commettent des délits ou quasi-délits est bien différente de celle de ceux qui pouvaient ignorer le défaut de formalité et acheter de bonne foi ; pour eux, il était juste de fixer un temps, après lequel ils pourraient jouir en paix et avec sûreté de ce qu'ils avaient acquis de bonne foi, tandis que ceux qui avaient fait telle vente devaient être pour toujours garants de leur méfait. Ce qui précède suffit pour indiquer que j'approuve le jugement dont appel sous tous les rapports. Je l'approuve en ce qu'il déclare que les formalités voulues et requises par la vente d'immeuble pour taxes, etc., n'ont pas été accomplis dans l'espèce, en ce que les allégués de la déclaration et les conclusions sont suffisantes pour justifier tout ce qui est ordonné et décrété par le jugement, en ce qu'il admet

la prescription de deux ans en faveur de l'adjudicataire Charlton, tandis qu'il la refuse à l'égard des municipalités, en ce que, pour ces raisons, il renvoie l'action de Barlow contre l'adjudicataire, tandis qu'il condamne les municipalités à indemniser Barlow de la perte qu'il éprouve, en ce qu'il réserve à l'appelant les recours qu'il peut avoir en temps opportun, au sujet du droit hypothécaire qu'il a sur la partie du lot qu'il a vendue à Demers, lequel n'étant pas en cause, rien ne peut être statué à son égard. Jugement confirmé avec dépens contre les appelantes dans toutes les cours.

Dissentientibus l'Hon. M. le juge en chef et M. le juge DRUMMOND.

BADGLEY, J., et MONK, J., furent d'opinion de confirmer le jugement, disant que les parties, par leurs procédures, s'étaient fait une loi qui avait été adoptée par la cour, en revision, et qu'ils ne voyaient pas l'opportunité de changer ce jugement; mais tous deux dirent que la Cour de Revision aurait dû annuler l'acte de vente de la corporation du comté d'Arthabaska à Charlton, qu'ils auraient approuvé cette décision si elle avait été faite; mais qu'ils confirmaient ce jugement car il était conforme à la loi des parties entre elles.

M. le juge en chef DUVAL et M. le juge DRUMMOND disaient que la cour, en revision, aurait dû suivre strictement la loi et mettre à néant l'acte de vente de la corporation du comté d'Arthabaska à Charlton, qui était nul en tout point. (14 *J.*, p. 226; 1 *R. L.*, p. 759, et 14 *R. L.*, p. 697)

MONTAMBAULT, TASCHEREAU et HONAN, pour les appelants.

E.-L. PACAUD, pour l'Intimé.

N. B.—M. le juge en chef MEREDITH et M. le juge POLETTE étaient en faveur de la limitation d'action.

M. le juge en chef DUVAL, et MM. les juges DRUMMOND, BADGLEY, MONK, STUART, pour annuler l'acte de vente.

MM. les juges CARON, TASCHEREAU et BOSSÉ pour la limitation d'action, si invoquée par l'adjudicataire de bonne foi, mais contre la limitation d'action quant aux corporations municipales.

ACTION EN BORNAGE.

SUPERIOR COURT, Montreal, 31st March, 1870.

Coram TORRANCE, J.

MOINEAU *vs* CORBEILLE.

Held: That, where the court cannot correctly know the limits of the land of plaintiff and defendant, according to their titles and possession, from the evidence of record, in an action *en bornage*, it may order a plan to be made by a surveyor, showing the respective pretensions of the parties.

The parties were heard on the merits of an action *en bornage*, and the court gave the following interlocutory judgment: "La cour, considérant que l'action est en bornage, et que les allégués des demandeur et défendeur ont rapport à leur possession respective, et mettant en question leurs titres, et qu'on ne peut connaître correctement les limites de leurs héritages, conformément auxdits titres et possession, sans un plan figuratif d'iceux, est d'opinion et adjuge que la cour n'a pas suffisamment devant elles les preuves nécessaires pour fonder un jugement, en conséquence, ordonne que, par un arpenteur dont les parties conviendront, sinon sera nommé d'office par la Cour, il sera procédé, en présence des parties ou elles dûment appelées, à dresser un plan figuratif des lieux en contestation, désignant particulièrement leurs prétentions respectives, tant d'après leurs titres que d'après leurs possessions alléguées, lequel arpenteur sera tenu de faire son rapport le plus tôt que faire se pourra à la cour, pour y être ultérieurement procédé ainsi que de droit." (14 *J.*, p. 236)

L. L. CORBEIL, for plaintiff.

BÉLANGER et DESNOYERS, for defendant.

PROCEDURE.—FORCLUSION.

COUR SUPÉRIEURE, Montréal, 20 juin 1870.

Coram BEAUDRY, J.

TRACY *vs* ISAACSON *et al.*

Jugé: Que la forclusion du défendeur de plaider à l'action ne peut pas être accordée par le protonotaire en certains cas.

Il s'agit ici d'une demande ou requête sommaire pour faire mettre de côté les forclusions mises au dossier par le demandeur contre les défendeurs, sous les circonstances suivantes: Le demandeur a mentionné dans sa liste quatre pièces au soutien de son action; la pièce n° 4 était un reçu sous seing privé. Cette pièce n'a pas été produite avec la déclaration, le 4 mai; elle ne l'a été que le 20 mai dernier, après une première demande de plaider. Avis de cette production en a été donné le même jour; puis, le 30 mai 1870, avis de nouveau de plaider, et le 7 juin un acte de forclusion est accordé par le protonotaire. Inscription à l'enquête, *ex parte*, enquête et inscription pour audition au mérite, *ex parte*. Les défendeurs ont fait motion pour faire rejeter la pièce n° 4, comme produite irrégulièrement, et faire annuler la forclusion, et tous les procédés subséquents, se

basant sur l'art. 141 C.P.C. et prétendant que le demandeur aurait dû demander le consentement des défendeurs ou la permission de la cour pour produire cette pièce. Le demandeur soutenait qu'il s'était conformé à l'art. 106, en donnant avis à la partie adverse de la production de sa pièce n° 4; et que, par l'art. 137, le protonotaire pouvait lui accorder un acte de forclusion, à l'expiration des trois jours après la demande de plaider.

PER CURIAM : Les défendeurs ont invoqué l'art. 141 C.P.C. Le demandeur, au contraire, cite l'art. 106 et prétend s'y être conformé. Je pense que c'est cet article qui doit nous servir de règle ici, car il se rapporte aux pièces qui sont invoquées au soutien de la demande. Par l'art. 103, le demandeur ne peut procéder tant que ses pièces n'ont pas été produites, et l'art. 106 ajoute qu'elles ne peuvent l'être sans en donner avis à la partie adverse, sauf le cas de l'art. 100, qui permet de retenir la pièce lorsqu'elle est sous seing privé, en mettant dans le dossier une copie certifiée par la partie ou son procureur (ici on a mis dans le dossier une pièce qui n'est pas certifiée). *L'art.* 141 *ne peut s'appliquer au cas actuel*, car, quoique la disposition soit générale, elle n'a cependant rapport qu'aux pièces produites avec les *plaidoiries*, expression sous laquelle on ne peut faire mettre le bref d'assignation et la déclaration, et elle ne saurait mettre au néant la disposition spéciale contenue dans l'art. 106. Sur ce point, les défendeurs ne peuvent réussir à faire rejeter la pièce ou la faire considérer comme produite irrégulièrement. Cependant ils doivent réussir sur la forme de la forclusion. L'art. 141 dit que lorsqu'une partie n'a pas produit ses pièces de la manière prescrite, la forclusion ne peut avoir lieu sans l'ordre du tribunal. Le protonotaire ne pouvait accorder cette forclusion, et elle devra être mise au néant, avec toutes les procédures qui l'ont suivie.

"The court doth declare thefore closure entered of record, irregular and null, and doth set aside the same, as well as all proceedings had in the said cause by plaintiff since the fyling of said foreclosure, without costs." (14 *J.*, p. 236)

DOUTRE, DOUTRE et DOUTRE, avocats du demandeur.

CARTER et HATTON, avocats du défendeur O'Farrell.

KERR, LAMB et CARTER, avocats des défendeurs Isaacson et Hayes.

VERBAL TESTIMONY.

SUPERIOR COURT, Montreal, 31st March, 1870.

Coram TORRANCE, J.

THE GLEN BRICK COMPANY *vs* SHACKELL.

Held: That a witness shall not be interrogated about a copy of a statement until the non production of the original is accounted for.

TORRANCE, J.: This case comes up on a motion by defendant to revise a ruling of BERTHELOT, J., at *enquête*. The action is to recover a balance remaining unpaid to plaintiff on a subscription of ten shares in the company. The defendant pleads to the action that he was induced by false and fraudulent representations by the company and its secretary, Walker, to subscribe for the stock. Walker was under examination and the following question was put to him. "Did you not present to the defendant a statement of the affairs of the company, after his second subscription, and say when; and is not paper now shewn you marked "Bb" a copy thereof, and does not said paper show that before the first of March, 1869, the company plaintiff was embarassed and insolvent, and working at a loss, and produce such original if you have it." Plaintiff objects to this question, as illegal and irrelevant under the issues and as relating to the affairs of the company at a period long subsequent to defendant's subscription, and, farther, inasmuch as said paper, purporting by the question to be a copy of original statements of the company's affairs, cannot now be legally proved or fyled. The objection was maintained. The court now thinks that the question is inadmissible as seeking to prove a statement by secondary evidence before accounting for the non production of the original. Motion rejected. (14 *J.*, p. 238)

A. and W. ROBERTSON, for plaintiff.

PERKINS and RAMSAY, for defendant.

PROCEDURE IN APPEAL.

COURT OF QUEEN'S BENCH, APPEAL SIDE,
Montreal, 17th September, 1871.

Coram DUVAL, Ch. J., CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

THE GLEN BRICK COMPANY *and* HENRY-W. WALKER, appellants, *and* HENRY SHACKELL, respondent.

Held: That when two parties, raising separate and distinct issues, appeal jointly by one and the same writ, the respondent may, with leave of the court, fyle separate appearances on each issue.

PER CURIAM: This is a motion by respondent to be allowed to fyled a separate appearance on each separate issue raised by appellants, who have appealed jointly and by one and the same writ. We see no objection to this, and the motion is therefore granted. (16 *J.*, p. 257)

A. and W. ROBERTSON, for appellants.

PERKINS and MONK, for respondent.

DONATION OF MOVEABLES.

CIRCUIT COURT, Montreal, 15th March, 1870.

Coram TORRANCE, J.

DEMERS *vs* LEFEBVRE, *and* VANDAL *et al.*, opposants.

Held: That a gratuitous donation, in May, 1863, of moveables without displacement, although there was registration in the registry office of the domicile of donor and donee, is inoperative as against posterior creditors.

TORRANCE, J.: The defendant, in May, 1863, made a gratuitous donation (Martin, N. P.) to her three daughters, Emérencienne, Sophronie and Sophie Vandal, of the moveables seized under the judgment against defendant. The debt of plaintiff only arose after the donation, but it was for wood supplied to the common domicile. The donation was registered on the 7th September, 1864. in the registry office, at Montreal, which was the domicile of both donor and donees. The donation stipulated for retention of usufruct to the donor, as long as she lived. The donor has always continued in possession. The plaintiff took in execution the moveables for the debt of defendant The opposants, the donees, have fyled an opposition *à fin de distraire*, and the question before the

court is whether the title to the proprietorship has vested in the donees under the circumstances. There was no displacement or delivery to the donees. Can a posterior creditor take the property for a debt of the donor ? The C. C., art. 777, was cited at the argument, but the jurisprudence anterior to the Code should be our guide, and that jurisprudence has been well established ever since the case of *Seed* and *Bonacina* (1). The rule laid down there will be applied here, and the opposition is dismissed, with costs. (14 *J.*, p. 241)

F. X. A. TRUDEL, for opposants.

DE BELLEFEUILLE and TURGEON, for plaintiff.

DESISTEMENT.

CIRCUIT COURT, Montreal, 15th December, 1869.

Coram TORRANCE, J.

COPLAND *et al. vs* CAUCHON *et al.*

Held: That, where a plaintiff gives notice of a motion to reject an exception *à la forme*, as not filed within the delays limited by the C. C. P., art. 1070, and, afterwards, answers the exception by an answer in law and fact, without reserve of the motion, the answer is a waiver and *désistement* of the motion.

PER CURIAM : The plaintiffs have made a motion to reject an exception *à la forme*, as fyled after the four days limited by the C. C. P., art. 1070. The writ and declaration were returned into court on the 26th November, 1869. On the 1st December, the exception was fyled. On the 6th December, Plaintiffs gave notice of the present motion, and, on the 9th December, they fyled an answer *in law and fact* to the exception. The defendants contend that the answer made on the 9th December was a waiver and *désistement* of the motion of which notice was given on the 6th, as the answer made no reserve of the right to make the motion. The court is with the defendants. Motion rejected. (14 *J.*, p. 242)

LAFLAMME and LAFLAMME, for plaintiff.

DOHERTY and DOHERTY, for defendant.

(1) Un acte de vente de meubles, passé devant notaires, dans lequel ne se trouve aucune stipulation de dessaisine et saisine, cet acte mentionnant seulement que l'acheteur a mis sa marque sur deux des articles vendus qui sont restés en la possession du vendeur, doit être considéré comme frauduleux, bien qu'il y ait eu bail subséquent desdits meubles par l'acheteur au vendeur, par le motif qu'il n'y a eu aucun déplacement ou tradition légale des objets vendus ; en conséquence un créancier du vendeur, même postérieur à une telle vente, peut faire saisir et vendre lesdits meubles sur le vendeur. (*Bonacina* et

CRIMINAL PROCEDURE.—CASE RESERVED.—STAND ASIDE.

COURT OF QUEEN'S BENCH, Montreal, 9th June, 1870.

Coram DUVAL, C. J., CARON, J., DRUMMOND, J., BADGLEY, J., and MONK, J.

THE QUEEN *vs* EDWARD C. FRASER.

Held: 1. That even before 1st January, 1870, on a trial for a misdemeanor, the Crown might, without showing cause, direct jurors, on their name being called by the clerk of the court, "to stand aside," until the panel has been gone through. (1)

2. Illegal evidence allowed to go to the jury under reserve of objection may be subsequently ruled out by the judge in his charge, and the conviction is not invalidated thereby, if it does not appear that the jury were influenced by such illegal evidence.

3. The Court of Queen's Bench in Appeal will adjudicate upon a reserved case of misdemeanor in the absence of the defendant who has fled beyond the jurisdiction of the Court.

This was a case reserved by Mr Justice MACKAY under C. S. L. C. cap. 77. sec. 57. The case was stated as follows: "The indictment reads that Edward C. Fraser, on the 18th of April, 1868, at Montreal, did, knowingly and fraudulently, obtain, from David Robertson, certain goods and chattels, his property, to wit, three ½ chests of gunpowder tea, worth $136.50, three ½ chests of gunpowder tea of the value of $85.25, &c., with intent to defraud said David Robertson of the same, and of the said respective values thereof, against the form of &c." The defendant was tried before me on the 7th, 8th and 9th of April, 1869, at Montreal, at the term of the Court of Q. B., Crown Side, then being held. At the commencement of the trial, on the 7th of April, while the jury was being empanelled and the jurors called, the name of John Hicks was called, and he appeared and answered, and was about to step into the jury box, when he was ordered to stand aside by the counsel for the prosecution. The defendant's counsel objected to this proceeding by the counsel for the prosecution, and claimed that, upon

Seed, C. B. R. en appel, Montréal, 12 octobre 1853, ROLLAND, J., PANET, J., et AYLWIN, J., confirmant le jugement de C. S., Montréal, 4 janvier 1853, SMITH, J., dissident, et DAY, J., 3 D. T. B. C., p. 446). Le juge ROLLAND, quoique pour la confirmation du jugement, était d'opinion que l'acte de vente était valable entre les parties, sauf le recours de ceux qui ont intérêt à ce que la vente n'ait pas lieu ; que, dans ce cas, le déplacement devient une formalité nécessaire, et que tous les meubles qui sont en la possession du débiteur peuvent être saisis, quels qu'ils soient.

(1) 1 By the S. of C. of 1869, 32-33 Victoria, cap. 29, sec. 38, which took effect on 1st Jannuary, 1870 : "In all criminal trials, whether for treason, "felony or misdemeanor, four jurors may be peremptorily challenged on the "part of the Crown ; but this shall not be construed to affect the right of the "Crown to cause any juror to stand aside until the panel has been gone "through, or to challenge any number of jurors for cause."

trial of such a case as the present misdemeanor case, the Crown, or those prosecuting, had no right to order jurors to stand aside, but only right to challenge for cause. I ruled against defendant, and Hicks was ordered to stand aside, and he was not sworn. I intimated at the time that, in the event of defendant being convicted, I would state a case, and reserve for the court in term to say whether my ruling just referred to was correct and legal, or was erroneous. Michael Carrol, another juror, was then called, and he answered; but was, in like manner, ordered to stand aside by the counsel prosecuting the indictment; defendant's counsel objecting as before, and I ruling and intimating as before upon Hicks' being ordered to stand aside. Michael Carrol, of course, was not sworn. In like manner, seven others, jurors called, were ordered to stand aside and were not sworn. On the same day, Alfred Rimmer was called as a witness for the prosecution, and, at his examination, he was asked as to whether he had sold defendant goods, and whether he had had conversation with defendant about his business. The defendant's counsel objected to proof of sales to defendant by others than David Robertson, and to proof of circumstances whatever about such other sales. I overruled the objection, stating that, in the event of defendant being convicted, I would state a case and reserve for the court in term to say whether my ruling last referred to was legal, or was erroneous. Rimmer then said that defendant, on the 18th of April, 1868, was indebted to him in respect of a purchase made from him in February, 1868; that he had asked defendant about his business, and that defendant said that he owned his own place and had about $7,000 of capital; that, afterwards, he, Rimmer, sold to defendant, took defendant's note, and that defendant never paid him a penny; the note fell due 26th May, 1868. John H. Semple, on the same day, 7th April, was examined as a witness for the prosecution, and swore to defendant's having purchased on the 27th January 1868, from his firm, of Moore, Semple & Hatchett, goods for which defendant gave a note due 30th May. This evidence was objected to by defendant's counsel, by objection similar to that made upon Rimmer's examination, and hereinbefore stated. I overruled the objection and stated as when disposing of the objection made in the case of Rimmer's evidence. [It is to be observed that Semple was not asked as to statements by the defendant to him, and did not, in fact, speak of any such, or of conversations with defendant]. John Francis Crean was afterwards examined for the prosecution, and was asked as to a tea company, for which Crean was agent, selling defendant teas in February, 1868, and as to conversation between him, Crean, and defendant, as to defen-

dant's circumstances about the 11th of February, 1868. Defendant's counsel objected to this evidence and to Crean being so asked; making like objection as before upon Rimmer's examination. I overruled the objection exactly as before; and Crean proved conversation with defendant, and statements by defendant, made about the 11th of February 1868; that he owned the house he then occupied and a good part of the neighboring street. On the 8th of April, second day of trial, early that day. I stated from the bench, to defendant's counsel, that I would charge the jury to disregard the evidence of Rimmer and of Crean, as to statements by defendant to them about his business, and about his owning the house he occupied, and other property, unless these statements could be shown to have influenced David Robertson, or his salesman, when delivering to defendant the goods mentioned in the indictment. On the 9th of April, I charged the jury, and in doing so said, among other things: " As to the fact of def-
" endant having made other purchases, and as to the fact of
" his owing money upon other purchases, I have admitted
" evidence and I think that the circumstances of defendant
" ought to be considered. Nevertheless, as to what Rimmer
" and others, have said that defendant said to them, when
" about purchasing from them, I tell you, in favor of defendant,
" to disregard these alleged statements by defendant about his
" business and property, and to take the fact of defendant's
" indebtedness, as spoken of by Rimmer and others, and no
" more, from these witnesses. These alleged statements by
" defendant about his business and property have not been
" proved to have moved Robertson, or his salesman, in any
" way, to the transaction referred to in the indictment." The jury, by their verdict, found defendant guilty (with a recommendation to mercy), but judgment has not followed, because defendant has disappeared, and, although a warrant has issued against him, to have him arrested, he cannot be found. The opinion of the judges, Court of Queen's Bench, is requested as to whether the conviction of defendant is to be maintained. Is the conviction to be set aside? Was the jury composition regular and legal? Was the ordering of the juror, John Hicks, to stand aside, legal, and so of the juror Michael Carroll, and so of the other seven jurors, who were ordered to stand aside? Then, again, is the conviction bad, because of my having ruled as stated upon Rimmer's examination, and Semple's and Crean's, notwithstanding my charge to the jury, above stated?"

J. A. PERKINS, for the Crown: The grand jury of this district, the 2nd October, 1868, returned "True Bill" against Edward C. Fraser, upon indictment brought under 18 Vict.,

c. 92, s. 11, (Con. Stat. Canada, ch. 92, sec. 73), for having, the 18th day of April, 1868, obtained of David Robertson, of Montreal, merchant, property, groceries, of the value of $465.72, with intent to defraud (a misdemeanor, punishable by imprisonment for any period not exceeding two years, with or without hard labor). Upon plea of "Not Guilty," he was tried before this court (Mr Justice MACKAY presiding) during the 7th, 8th and 9th days of April last. The jurors sworn returned a verdict of guilty, with a recommendation to mercy. The matter comes before this court upon case reserved by the Honourable presiding Judge, as to 1st The right of counsel prosecuting to order and request (as allowed by the court) one or more jurors to stand aside; 2nd The right of the prosecution to prove by others than the prosecutor (David Robertson) conversations with the accused, as to his affairs, prior to the 18th April, 1868; 3rd Upon such evidence allowed, whether or no the charge of the presiding judge, charging the jury to pay no attention to such conversations, save as relating to his indebtedness to parties holding same with the accused, effectually rules out such evidence, if illegal, so that the same cannot thereafter be questioned. The Crown, under the case reserved, which states: "Judgment has not followed, because "defendant has disappeared, and, although a warrant has issued "against him, to have him arrested, he cannot be found," respectfully submits, that the case reserved cannot be argued before or considered by this court in the absence of the accused, who should not be allowed to obtain the opinion of the court without being present to abide its final and all-wise decision. Should it be decided that there was error in the decisions given, there would have been mistrial, and the accused be liable to new trial. No motion for, or demand of, new trial is heard or sanctioned without the personal presence of prisoner. "All defendants must be present when the rule "for new trial is moved for, otherwise some of defendants "would get the opinion of the court by putting forward one "of their number, they keeping out of the way." *The King* vs *Teal and others*, 11 East's Rep., p. 305; *The King* vs *Askew and others*, 3 Maule and Selwyn's Rep., p. 9; *The King* vs *Lord Cochrane and others, Idem*, p. 10; *The King* vs *Hollingberry and others*, 4 Barnewall and Cresswell's Rep., p. 329; *The King* vs *Gibson*, 2 Strange's Rep., p. 968. Wharton, 4th edit., *Am. Cr. Law*, § 3228: "The defendant must be per-"sonally in court at the application for new trial, and, "where several defendants are convicted, *all* must be ac-"tually present." 2 Denison's Crown Cases, p. 372, note c. As to the presence of prisoners in court when a motion is made for a new trial. *Regina* vs *Caudwell*, Mich. Term, 17 Q.

B. Rep., p. 503. The defendant, in this case, was tried on an indictment for perjury, before ERLE, J., at the Berkshire Summer Assizes, and having been found guilty, was sentenced to transportation for seven years. Pigott and Huddlestone, on the 6th November, being about to move in the Queen's Bench for a new trial, Lord CAMPBELL, C. J., said: "Is the defendant in custody?" Pigott: "He is not." Lord CAMPBELL, C. J.: "Is he present in court?" Pigott: "No." Lord CAMPBELL, C. J.: "Then we cannot hear your application." Pigott: "Since 11 George 4 and 1 William 4, c. 70, sec. 9, it has not been decided to be necessary. In *Rex* vs *DeBerenger and others*, 3 Maule and Selwyn's Rep., p. 67, a motion was made for arresting the judgment, although two of the defendants were not present to receive the judgment. In this case no warrant has been issued for committing the defendant in execution." Lord CAMPBELL, C. J.: "I have always considered it to be a hardship, where there are several defendants who have been found guilty on an indictment, not to allow one of them to move for a new trial, unless all the other defendants are present when the motion is made. But, there can be no such hardship where there is but one defendant. In this case peculiarly, the defendant ought to be in court. Sentence has been passed, which he has hitherto evaded, and the court will not permit him to make the experiment of obtaining a new trial without coming into court to abide the consequences in case we should sefuse the rule. See 1 Chitty's Crim. L., p. 659; 2 Dowling and Ryland's Rep., p. 46. But as a general rule, when an application is made for a new trial, all the defendants must be actually present in court, unless some special ground be laid for dispensing with the rule. As to the power of the court to dispense with the presence of the defendant; see *Rex* vs *Boltz*, 8 Dowl. & Ry. Rep., p. 65; see also *Reg.* vs *Caudwell* (above cited), and see Bacon's Abr., v° "Trial," (L), n° 9, p. 789; Comyn's Dig., v° "Indictment," N; Tidd, Prac., 945; *Rex* vs *Cochrane* (Lord), 3 M. & S., p. 10, *n*. It is admitted that, in moving for a new trial, where the defendant is not liable to personal punishment, but to a fine, it is not necessary that the defendant should be present in court. *Regina* vs *Parkinson*, Denison and Pearce, Crown Cases, vol. 6, pp. 457-8: S. C. 21, L. J. M. C., 48 (*n*); Russell, on Crimes, edition 1857, vol. 2, p. 726. *Rex* vs *Mawbey*, 6 T. R., 638; Tidd, 942, 943. It may be now stated that defendant might have attempted to obtain a new trial upon matters set forth in the case reserved. His presence then would have been required. His application would not have received audience in his absence. Why, then, if the Honourable presiding Judge, *ex mero motu*, and for the benefit of the accused alone, chooses to reserve points, the re-

servation whereof depended solely upon his own will, should the accused be in a better position, and while not trusting to his own case as ably submitted, attempt to obtain the decision of this court while beyond and away from its high authority and jurisdiction. The Crown, therefore, respectfully submits that no call to argue the reserved case should now be made upon the parties prosecuting. 2° As to the ordering to stand aside of John Hicks and other jurors, it may be at once stated that it was made in obedience to a request of prisoner's counsel for a mixed jury. Once made, it was taken advantage of, but the prosecutors persisted, well knowing their right and fearing neither injustice nor illegality. In this Province, in cases of misdemeanor, counsel for the Crown have by the court been permitted, after objection and argument, to order jurors to stand aside. *Regina* vs *Charles H. Adams et al.* (the Kidnapping Case), September Term, 1865. *Regina* vs *Jean-Bte Leger dit Parisien* (on Indictment for Perjury), September Term, 1867, Hon. Mr Justice BADGLEY. See also Wharton's Am. Cr. Law, pp. 2956-7; Joy, on Challenges, page 146; Roscoe, Criminal Evidence, ed. 1866, page 197, Challenges to the Polls: "A practice, however, which has continued *uniformly* from the time of Edward I to the present, enables the prosecutor to exercise practically the right of peremptory challenge; because, when a man is called, the juror will, on his request, be ordered to *stand by*, and it is only when the panel has been exhausted, that is, when it appears that, if the jurors ordered to stand by are excluded, there will be a defect of jurors, that the prosecutor is compelled to show his cause of objection." *Mansell* vs *Regina*, Dear. & B. C. C., 375. When it appears that, in consequence of the peremptory challenges by the *defendant*, and the jurymen ordered to stand by, at the request of the prosecutor, a full jury cannot be obtained, then the proper course is to call over the whole panel again, only omitting those that have been peremptorily challenged by the defendant. *Regina* vs *Geach*, 9 Car. & P., 499. And even on the second reading over of the panel, a juryman may be ordered to *stand by*, at the request of the prosecutor, if it reasonably appears that sufficient jurymen may yet appear. *Mansell* vs *Reg.* (*supra*). 3° As to the evidence of Alfred Rimmer, John H. Semple and John F. Crean, mentioned in the case reserved, it will be remembered that the Honorable Judge, in his charge, effectually ordered the jury to disregard certain portions thereof. The jurors receive the law from the court; it is not to be presumed that *they did regard* such portions. The contrary is certainly to be presumed, as, in all respects, the jurors obey the rulings of this court. That the charge directed the disposal of any (pretended) illegal evidence, estopps any party from

further inquiry as to its supposed effect. It will no doubt be said, and much stress laid thereon, by the learned counsel representing defendant: "Oh! but the jurors heard the evidence. It had its effect upon their minds." This is a strange argument to address to Her Majesty's Court of Queen's Bench, for it is alone based upon the (unfounded) supposition that jurors wholly disregard the charges of the judges of this court. But the prosecution may well contend that the evidence, legal or illegal, was wholly immaterial, and, therefore, could not, by any possibility, have influenced the result. No error, therefore, exists. *Vallance* vs *King*, Supreme Court of New York, 3 Barb. Sup. Ct. Rep., 548; *Wiggin* vs *Damsell*, 4 New Hamp. Rep., 69; *Bank* vs *Woodard*, 5 N. H. Rep., 301; *Crosby* vs *Fitch*, 12 Conn., 410; *Landon* vs *Humphrey*, 9 Conn. Rep., 209; *Norris* vs *Badger*, 6 Cowen's Rep., 449. One part of this prosecution consisted in the shewing that Edward C. Fraser was, and knew, and had full cause to know, that, on the 18th day of April, 1868, when he purchased from David Robertson, he was hopelessly insolvent and unable to pay his debt. This could only be proven by the testimony of his creditors (Rimmer, Semple and Crean). The question, therefore, was asked: "Did he purchase of you? when? how much?" Then the question: "What conversation did he have with you? was fairly legal. Queries as to legality or illegality of testimony can only be decided as to and upon the questions propounded. The answer rarely comes up to the expectation. The answer is not to be presumed. Each witness might have testified to an admission of insolvency. They might have testified to facts which the Crown could latter have proved Robertson to have become aware of, and, therefore, gave credit and sold goods to the prisoner. But, in cases like the present, fraud must be proved from acts and confessions. There is no other means known to our law, as the intent is to be judged from the fact. All surrounding circumstances, every act and every saying of the accused, everything touching his business and affairs, is fit matter of evidence.

F. CASSIDY, Q. C., was heard for defendant. He argued that the practice, as established in Montreal, did not allow peremptory challenges in cases of misdemeanor, and that the direction to "stand aside" was, in point of fact, a peremptory challenge.

MONK, J., dissenting: I would not interfere with the conviction on the ground of the admission of the evidence, but, as to the other point, is there such a thing as peremptory challenge in a case of misdemeanor? It is said, on the part of the crown, that the jurors were only told to stand aside; but that is equivalent to a peremptory challenge. I have great difficulty in coming to the conclusion that there is any autho-

rity that states there is a challenge for misdemeanor, except challenge for cause. The great difficulty, I feel, arises from this, that, for thirty or forty years, it has been the invariable practice of the Queen's Bench, in Montreal, to hold that, in misdemeanors, there is no challenge, except for cause. I do not wish to disturb that practice, and say that the court has been in error during all that time.

DRUMMOND, J.: I agree with Mr. Justice MONK, and corroborate fully, as far as my experience goes, what he has stated with reference to the practice in challenges for misdemeanor. I can go back to 1826, when James STUART was conducting a criminal case, and Chief Justice VALLIÈRES DE ST-RÉAL said he had never heard the doctrine that there was such a thing as peremptory challenge allowed in misdemeanors.

DUVAL, C. J.: As to the right of the judge to direct a juror to stand aside, either in misdemeanor or in felony, I take that to be undeniable. I have never known the practice to be doubted, and I have known the right to be constantly exercised. I have been acquainted with the practice at Quebec for forty years, and have practised there when the court was presided over by Chief Justice SEWELL whose opinion was held second to none in England. It is said the practice in Montreal has been different. The practice is nothing more than routine. But name a case where the question was raised and the right denied. In Archbold, *Pleading and Evidence*, it is stated that, in cases of misdemeanor, no right of peremptory challenge exists at all, the privilege having been originally given by the common law *in favorem vitae*, although it is now extended to all cases of felony. But it has been usual for the officer of the court to abstain from calling any particular names mentioned to him, if others be left to form a jury. Roscoe says: "A practice which has continued uniformly from the time of Edward I to the present, enables the prosecutor to exercise practically the right of peremptory challenge; because, when a man is called, the juror will, on his request, be ordered to *stand by*, and it is only when the panel has been exhausted, that the prosecutor is called upon to show his cause of objection. As to the question of evidence, the judge allowed it to be taken, because he was not prepared to say, at the moment, that it was inadmissible; but he afterwards told the jury to disregard it. I wish to be distinctly understood on this point, that, if I entertained any doubt that this evidence influenced the opinion of the jury, either directly or indirectly, I would give the defendant the benefit of it; but I have not the slightest hesitation on the point. For these reasons, the judgment will not be interfered with.

BADGLEY, J., agreed with the Chief Justice. He referred to *Regina* vs *Lacombe* (1), and would apply his remarks in that case to the present. In the case of *Mansell*, (vol. 1, Dearsly and Bell's Crown Cases, pp. 375-425) would be found the jurisprudence on the subject from the time of Edward I.

The judgment is recorded as follows: "In the opinion of this court, the proceedings had and taken is the said court, at Montreal, are regular, the ruling of the judge presiding the Court of Queen's Bench is correct, and no reason hath been assigned, by and on behalf of Fraser, sufficient to set aside the conviction on the indictment." CARON, J., concurred. (14 *J.*, p. 245)

J. A. PERKINS, and V. P. W. DORION, for the private prosecution.

F. CASSIDY, Q. C., and B. DEVLIN, for the defendant.

COMPROMIS.—AVOCATS.

COURT OF REVIEW, Montreal, 31st March, 1869.

Coram MONDELET, J., TORRANCE, J., and BEAUDRY, A. J.

LAFAILLE *vs* LAFAILLE.

Held: That the parties in a suit, wherein the attorney of the plaintiffs has asked in the declaration for *distraction de frais*, can settle the suit as they please, without the concurrence of such attorney, and consequently that the attorney cannot (when the case has been so settled) continue the suit for mere recovery of his costs.

This was a hearing in review of a judgment rendered by the Superior Court at St-Johns, in the district of Iberville, on the 19th November, 1867, condemning defendant to pay the costs of suit to Mr Desplaines, plaintiff's attorney, *par distraction de frais*. In the declaration, plaintiff's attorney prayed for

(1) Lorsque, dans un procès criminel pour félonie, la Couronne, sur le premier appel du petit jury, a demandé qu'un des jurés appelés se tienne à l'écart, elle pourra de nouveau, sur un second appel, demander que le même juré se tienne à l'écart jusqu'à ce que le tableau soit épuisé, et elle n'est pas tenue de récuser pour cause et de donner des raisons au second appel, s'il y a encore des jurés pour former le tableau qui doit faire le procès. (*La Reine* vs *Lacombe*, C. B. R. en appel, Montréal, 10 septembre 1869, DUVAL, J. en C., CARON, J., DRUMMOND, J., dissident, BADGLEY, J., et MONK, J., confirmant le jugement de C. B. R., justice criminelle, Montréal, 5 juillet 1869, MACKAY, J., 13 J., p. 259, et 18 R. J. R. Q., p. 505)

La Couronne a droit de récuser, sans montrer cause, tout juré qu'elle juge à propos, jusqu'à ce que la liste soit épuisée, dans les cas de délit aussi bien dans les cas de félonie. Code criminel, art. 669. (*La Reine* vs *Hogan et al.*, C. B. R., justice criminelle, Montréal, 4 octobre 1865, MONDELET, J., 1 L. C. L. J., p. 70, et 18 R. J. R. Q., p. 150)

distraction de frais. The parties settled out of court, without the concurrence of plaintiff's attorney, and, on the 19th November, 1866, plaintiff's attorney fyled a *désistement*, declaring, at the same time, that he intended to continue the suit for the recovery of his costs. This suit was accordingly continued, and, by the final judgment, defendant was condemned to pay the costs of the suit *distraits* to Mr Desplaines, plaintiff's attorney. The Court of Review reversed this judgment, on the ground that, so long as the costs are not awarded to the attorney by actual judgment, the parties are free to settle as they please, without the concurrence of the attorney. Here follow the remarks of judge MONDELET in the Court of Review and the judgment of the said court.

MONDELET, J.: Il ne s'agit en cette cause que des dépens, et cela de la manière suivante: La demanderesse, vu certaines raisons dont le détail est ici inutile, intime à son avocat de discontinuer son action. La discontinuation a lieu, quant au fond, sauf les dépens, pour lesquels l'avocat de la demanderesse continue l'action, prétendant les pouvoir réclamer *par distraction.* L'action, par suite de la discontinuation de la demanderesse, se trouvait éteinte, et le droit en était acquis au défendeur. Les parties s'étant arrangées, il n'y avait pas eu de jugement sur la *distraction de frais* demandée en la déclaration de la demanderesse. La cour dont le jugement est soumis à la revision, a déclaré que l'arrangement a été fait en fraude des droits de l'avocat de la demanderesse, et a accordé les dépens contre le défendeur, en faveur de l'avocat, comme demandeur *par distraction de frais.* Le jugement, dans mon opinion et dans celle de la cour, est inexact; il ne peut être acquis à l'avocat de la partie aucun droit de *distraction de dépens*, sans un jugement. La demande ne suffit pas. La discontinuation de l'action y a mis fin; l'avocat n'avait plus rien à y faire. Le jugement dont est appel doit être infirmé. (1)

" La cour, considérant qu'il appert, par l'acte de la demanderesse, en date du 24 octobre 1866, produit le 19 novembre

(1) AUTORITÉS CITÉES: Par l'appelant en revision et défendeur en cour de première instance: Merlin, v° *Distraction*; 5 Pothier, *Du mandat*, n°s 133 et suivants; Rousseau de la Combe, v° *Distraction*; Ancien Denizart, v° *Distraction.* Par l'intimé en revision et demandeur par distraction de frais en cour de première instance: *Stigny* vs *Stigny*, 2 R. de L., p. 120; 2 R. J. R. Q., p. 178, et 18 R. J. R. Q., p. 380; *Pelletier* vs *Landry*, 2 R. de L., p. 120; 2 R. J. R. Q., p. 178, et 18 R. J. R. Q., p. 380; *Converse* vs *Clarke*, 12 D. T. B. C., p. 402; 11 R. J. R. Q., p. 113, et 18 R. J. R. Q., p. 380.

Les frais, dont distraction a été demandée dans les conclusions de la déclaration par le procureur *ad litem* du demandeur, lui seront adjugés par le tribunal, nonobstant l'arrangement par acte notarié intervenu entre les parties après le rapport de l'action, et par lequel le demandeur se désistait de son action et se chargeait d'en payer tous les frais. (*Charlebois* vs *Coulombe*, C. S., Montréal, 24 février 1863, MONK, J. A., 7 J., p. 300, et 12 R. J. R. Q., p. 178)

1866, qu'elle retirait son action, les parties ayant pris arrangement; considérant que, par la production de ce document par le procureur de la demanderesse, l'action de celle-ci a été mise au néant, et que le procureur de la demanderesse ne pouvait légalement intervenir en son propre nom dans la cause, et la continuer pour le recouvrement des frais dont il n'avait point obtenu distraction; considérant, par conséquent, que, par le jugement rendu par la Cour Supérieure siégeant dans le district d'Iberville, le 19 décembre 1866, lequel admet le procureur de la demanderesse à amender, dans ce sens, le désistement par lui fait le 19 novembre 1866, il y a mal jugé; considérant que, par ce jugement final, rendu le 19 novembre 1867, condamnant le défendeur à payer les dépens de l'action distraits à Mtre Desplaines, procureur de la demanderesse, il y a aussi mal jugé; infirme, casse.... et, attendu que Mtre Desplaines s'est, mal à propos et illégalement, immiscé en ladite cause, s'y constituant demandeur en son propre nom pour le recouvrement des dépens, et a, à cette fin, continué ladite action et persisté en Cour de Revision à soutenir le mal jugé susdit; le condamne aux dépens, tant sur les procédés illégaux en cour de première instance qu'en Cour de Revision. (14 *J.*, p. 262, et 1 *R. L.*, p. 90)

JETTÉ and ARCHAMBAULT, for plaintiffs.

LEBLANC and CASSIDY, for defendants.

SUBSTITUTION.—REPRESENTATION.

COUR DE REVISION, Montréal, 31 mai 1869.

Coram MONDELET, BERTHELOT et TORRANCE, JJ.

M.-A. CASTONGUAY *et al. vs* J.-L. BEAUDRY.

Jugé: 1° Que, dans les substitutions, il n'y a pas lieu au droit de *représentation*, à moins que le donateur n'ait manifesté clairement son intention de déférer les biens suivant l'ordre des successions légitimes.

2° Que, dans l'espèce, la donatrice n'a eu en vue qu'une substitution limitée à ses petits-enfants seulement.

3° Que la mort d'un des *appelés*, savoir un des petits-enfants de la donatrice, avant l'ouverture de la substitution, n'a pas produit un droit de *représentation* en faveur des demanderesses, arrière-petits-enfants de la donatrice et enfants de l'*appelé* décédé avant l'ouverture de la substitution, mais a produit un droit *d'accroissement* en faveur des *appelés* vivant lors de l'ouverture de la substitution.

Le juge MONDELET, *dissentiente*: Le jugement dont les demanderesses demandent la revision, fut rendu le 28 mars 1868, par la Cour Supérieure de Montréal [MONK, J.]. Par ce jugement, la cour a débouté l'action des demanderesses. Les faits

de la cause, qu'il importe de savoir, sont les suivants : Par acte de donation entre-vifs, reçu devant Latour et son confrère, notaires, à Montréal, le 14 mai 1827, Marie-Josephte Saint-Germain dite Gaultier, veuve de Jean-Baptiste Castonguay, fit donation entre-vifs, en faveur de F. X. Castonguay, son fils, présent et acceptant donataire, d'un emplacement situé au faubourg Saint-Laurent en la cité de Montréal. La donatrice déclare audit acte désirer conserver aux enfants à naître du légitime mariage du donataire, la propriété pleine et entière des biens désignés, sans l'étendre à un degré plus éloigné, voulant et entendant que les biens donnés au donataire, en jouissance, demeureraient substitués, comme elle les substituait, par ledit acte, aux enfants à naître en légitime mariage du donataire, auxquels elle donnait la propriété desdits biens, ce qui fut accepté pour eux par le donataire, leur père, voulant et consentant que ceux qui étaient appelés à la substitution fussent saisis des biens ainsi substitués, aussitôt que le cas de la substitution serait avenu, sans qu'ils fussent obligés d'en faire demande en justice. Il est aussi pourvu en la donation qu'au cas de mort du donataire, sans enfants, la jouissance et usufruit des biens donnés seraient réversibles à ses frères et sœurs, ou à aucun d'eux, pour par eux en jouir leur vie durante ; et que, si, au décès du donataire, sans enfants, tous ses frères et sœurs étaient décédés, la propriété des biens retournerait et appartiendrait à leurs enfants nés et à naître en légitime mariage, pour être partagés entr'eux *par souche*. Les demanderesses basent leurs prétentions sur les dispositions de cet acte de donation, alléguant qu'aussitôt après la donation, François-Xavier Castonguay s'est mis en possession du terrain dont il est question, l'a possédé jusqu'à sa mort qui a eu lieu le 2 décembre 1861, sans avoir jamais eu d'enfants. A la mort de F.-X. Castonguay, les seuls frères et sœurs de ce dernier, appelés, tant pour eux que pour leurs enfants, à recueillir la substitution qui devait s'ouvrir à la mort de F.-X. Castonguay, étaient Julie Castonguay, Josephte Castonguay et Jean-Baptiste Castonguay. Julie Castonguay est morte avant François-Xavier Castonguay, sans laisser d'enfants, mais Jean-Bte et Josephte Castonguay, qui sont aussi décédés avant François-Xavier Castonguay, savoir le 25 mai 1849 et le 3 mai 1861, ont respectivement laissé des enfants. Les demanderesses prétendent, en conséquence, que l'immeuble dont il est question est devenu, à la mort de François-Xavier Castonguay, la propriété, par égale portion, des enfants desdits Jean-Bte Castonguay et Josephte Castonguay. Jean-Bte Castonguay avait épousé à Montréal, le 20 mai 1805, Marie-Charlotte Hogue. De ce mariage naquirent six enfants, savoir Jean-Baptiste, Paul, Joseph-Magloire, Marguerite-Anasthasie, Marie-Thersile

et Marie-Eulalie Castonguay. Les demanderesses ont allégué, en leur déclaration, qu'à l'époque de l'ouverture de la substitution, dont François-Xavier Castonguay, le premier donataire, était chargé en faveur de son frère et de ses sœurs, et de leurs enfants, c'est-à-dire à l'époque de la mort de François-Xavier Castonguay, Magloire Castonguay, le fils de Jean-Baptiste Castonguay, étant décédé, son décès ayant eu lieu à Montréal le 11 janvier 1860, laissant des enfants issus de son légitime mariage avec Marie Dupuis, savoir Marie-Anne, Catherine, Marie-Marguerite-Claire, François-Xavier-Alfred, Jean-Baptiste-Ernest, Armand-Théodore, Marie-Louise et Joseph-Arthur Castonguay. Il est allégué que Marie-Anne, Catherine et Marie-Marguerite-Claire Castonguay sont maintenant majeures. Les demanderesses disent et allèguent qu'elles représentent, pour 2/7èmes, Joseph-Magloire Castonguay, leur père, décédé avant l'ouverture de la substitution, et, qu'en conséquence elles sont, à ladite époque en dernier lieu mentionnée, venues à la substitution, par droit de représentation de leur père ; qu'elles ont accepté la substitution, et qu'en cette qualité, elles ont recueilli cette substitution, quant à leur part, dans la moitié afférante aux enfants de Jean-Baptiste Castonguay, savoir 1/7ème dans la moitié égale à 1/12ème dans la totalité de cette propriété qui est en la possession du défendeur, qui est allégué s'être emparé, sans aucun droit, de la partie indivise appartenant aux demanderesses, et dont il perçoit les fruits comme propriétaire, lesquels excèdent $400. Les demanderesses concluent enfin à ce qu'elles soient déclarées propriétaires de 1/7ème d'un 1/12ème dudit immeuble ; que le défendeur soit condamné à leur payer ladite somme de $400, avec intérêt et dépens, et à les laisser jouir paisiblement, à l'avenir, des fruits et revenus de leur part dudit immeuble. Le défendeur a plaidé deux exceptions péremptoires en droit. Par la première, il maintient que les demanderesses ne représentent pas leur père dans les biens donnés en vertu dudit acte de donation ; que leur père, lors de son décès, survenu le 11 janvier 1860, n'avait aucun droit dans les biens mentionnés dans cet acte de donation, la donatrice, en stipulant que les immeubles donnés en usufruit à son fils François-Xavier Castonguay, passeraient en propriété à ses enfants, et qu'au cas où il décèderait sans enfants, alors ledit usufruit passerait à ses frères et sœurs, et enfin, qu'au cas du décès du donataire, sans enfants, et du prédécès de ses frères et sœurs, la propriété des immeubles donnés écherrait à leurs enfants nés et à naître, par souche, sans vouloir étendre la donation à un degré plus éloigné, a manifestement témoigné de son intention qu'il y eut accroissement entre les enfants nés et à naître ; les termes dudit acte de donation excluant l'idée de la représen-

tation en faveur des arrières-petits-enfants de la donatrice, et Joseph-Magloire Castonguay ayant prédécédé François-Xavier Castonguay, son oncle, la part qui lui serait advenue est accrue, par droit d'accroissement, à ses frères et sœurs. Par cette première exception péremptoire, le défendeur prétend, en outre, que, par acte de vente et cession du 25 février 1859, Joseph-Magloire Castonguay vendit à Pierre-Edouard Leclerc, l'auteur du défendeur, son garant, et qui a pris son fait et cause en la présente instance, tous les droits et prétentions qu'il pouvait avoir dans lesdits biens, tant comme héritier de Paul, son frère décédé, qu'en vertu de l'acte de donation susdite; que Pierre-E. Leclerc a acquis tous les droits et prétentions des frères et sœurs de Joseph-Magloire Castonguay dans lesdits biens, en leur qualité d'héritiers de Paul, leur père, et en vertu dudit acte de donation, par différents actes de vente exécutés avant le décès du donataire François-Xavier Castonguay, desquels actes, le défendeur donne les dates respectives dans son exception, et prétend qu'en vertu de ces actes tous les droits dans les biens, dont étaient investis, par ledit acte de donation, les enfants de Jean-Bte Castonguay, frère du donataire et de Paul, leur père, et tous les droits desdits héritiers, par droit d'accroissement, sont échus audit Pierre-Edouard Leclerc, avec, en même temps, les droits de leur père, frère du donataire, et que Pierre-E. Leclerc était bien fondé à vendre et céder au défendeur actuel, tous lesdits droits et prétentions, comme il l'a fait par acte du 27 février 1863. De ce qui précède le défendeur conclut qu'il n'y a pas lieu à la représentation invoquée par les demanderesses, dans la part desdits biens afférant à leur père, Joseph-Magloire; qu'ils l'ont régulièrement transmise, ainsi que déjà allégué. Par sa 2nde exception péremptoire, le défendeur, sans se départir de la première, plaide qu'il est le propriétaire véritable de l'immeuble dont les demanderesses revendiquent une partie, et, à l'appui de sa prétention, il allègue que, lors de la passation de la donation du 14 mai 1827, la donatrice avait quatre enfants vivants, issus de son mariage avec Jean-Bte Castonguay, son époux, laquelle le défendeur nomma, et, par une énumération spéciale de mariage, naissance et décès, et d'acquisition par lui, tant de certains des membres des différentes familles Castonguay que du nommé Grenette, il arriva à l'assertion de la conclusion qu'il était investi de tous les droits et prétentions dans ledit immeuble, qui compétaient, lors du décès du donataire, François-Xavier Castonguay, survenu le 2 décembre 1861, (leurs enfants et tous ses frères et sœurs étaient alors prédécédés) aux enfants de feu Benjamin Castonguay, de feu Jean-Bte Castonguay et de feue Marie-Josephte Castonguay, en vertu dudit acte de donation

et conformément aux intentions de la donatrice ; lesdits enfants formant trois souches et étant, lors du décès du donateur, seuls habiles à recueillir, en vertu dudit acte de donation, la propriété dudit immeuble, à l'exclusion de tout autre prétendant. Comme on le voit, il s'agit de savoir s'il y a ici représentation ou accroissement. Le défendeur a soutenu que la représentation n'a pas lieu dans les substitutions. Je pense qu'il faut répondre à cela par une distinction, avec le Code Civil, art. 937, d'accord avec l'ancien droit : " La représentation n'a pas lieu dans les substitutions non plus que dans les autres legs, à moins que le testateur n'ait ordonné que les biens seraient déférés suivant l'ordre des successions légitimes, ou que son intention au même effet, ne soit autrement manifestée." Or, dans le cas actuel, qu'a fait la donatrice ? Ne déclare-t-elle pas qu'elle " fait la donation dans le but de gratifier le donataire, son présent héritier, et de le saisir, par anticipation et de le faire jouir actuellement des biens d'une succession dont il n'avait que l'espérance, et rendre ses présomptifs héritiers propriétaires desdits biens ? " Je le pense ; je trouve dans ces expressions de la donatrice la déclaration nullement équivoque qu'elle entendait uniquement que son fils succédât, pour ainsi dire avant qu'elle décédât, et je ne trouve dans cette partie de la donation, d'autre dérogation au droit commun, que ce qu'il en fallait pour assurer à son fils ce droit de lui succéder. Son intention si apparente, par l'usage deux fois des mots " présomptifs héritiers," est-elle douteuse ? Ne voulait-elle pas que les biens donnés fussent partagés entre les présomptifs héritiers de son fils en la manière ordinaire ? N'est-il pas également manifeste qu'elle entendait que ses arrières-petits-enfants pussent, par la représentation de leur père décédé, venir avec leurs oncles et tantes à la succession du donataire, leur grand-père ? Quel motif, d'ailleurs, pouvait-on raisonnablement supposer qu'aurait eu la donatrice, d'exclure ses arrières-petits-enfants ? Je n'en puis gratuitement admettre aucun. Cela posé, du moment que l'intention de la donatrice, que ses biens fussent transmis suivant l'ordre de la succession, est manifeste, et cela dans la ligne directe du donataire, je ne comprends pas comment on peut reculer devant la conclusion toute légale, toute logique que la donatrice voulait qu'il en fût ainsi, pour le cas où les biens donnés passeraient à ses petits-enfants, issus des frères et sœurs du donateur. Rien n'apparait dans la donation, qui indique que, dans ce dernier cas, elle voulût déroger au droit commun, non, pas plus que l'on puisse méconnaître sa volonté de ne le pas faire dans l'autre cas. Indépendamment de ce qui précède, la donation nous offre un autre moyen de résoudre cette question ; on le trouve dans la clause qui regarde particulièrement les petits-enfants, issus

des frères et sœurs du donataire. Laissons parler la donatrice : " Dans le cas," dit-elle, " de la mort du donataire, sans enfants, " la jouissance des biens ira à ses frères et sœurs ; et, si, au " décès du donataire, sans enfants, tous ses frères et sœurs " étaient décédés, la propriété retournera et appartiendra à " leurs enfants nés et à naître en légitime mariage, pour être " partagée entre eux par souche." Notre Code dit (art. 623) : " Dans tous les cas où la représentation est admise, le partage " s'opère par souches ; si une même souche a plusieurs bran- " ches, la subdivision se fait aussi par souche dans chaque " branche et, les membres de la même branche partagent " entre eux par tête." A cette théorie, le défendeur oppose une clause de la donation dans laquelle la donatrice exprime le désir " de conserver la propriété aux enfants du dona- " teur, sans l'étendre à un degré plus éloigné." Les demanderesses répondent, et j'adopte comme fondée cette réponse, que ces termes n'ont pas empêché qu'il y ait, premièrement, substitution en faveur des frères et sœurs du donataire, et, en second lieu, en faveur des enfants de ces mêmes frères et sœurs. Le défendeur ne fait pas de difficulté précisément sur ce point, mais, prétendant que la substitution doit être restreinte, il soutient qu'elle ne doit pas s'étendre au-delà des petits-enfants. On leur répond, et, là aussi, je concours avec les demanderesses, que les arrières-petits-enfants, représentant un petit enfant décédé avant l'ouverture de la substitution, viennent au partage avec les petits-enfants ; c'est, tout simplement, appliquer, comme le disent les demanderesses, les règles du partage par souche, partage adopté par la donatrice. Ainsi, en deux mots, si le partage s'opère par souche, la représentation s'ensuit par là-même aux termes de l'article 623 de notre Code. Ce qui fait que chacun des enfants de Jean-Baptiste, membre d'une souche principale, formant une branche ou souche incidente, ne prennent à eux tous que la part que Joseph Magloire eût prise, comme membre de sa souche principale. J'ai plus haut dit un mot de l'objection suscitée par le défendeur, ce qu'il prétend être une contradiction entre la déclaration des demanderesses et leurs réponses spéciales, dans lesquelles il est dit que les enfants de Joseph Magloire ont renoncé à sa succession, et tiennent leurs droits de la donatrice, leur bisaïeule. Qu'il suffise d'ajouter qu'il n'y a pas de contradiction après tout, puisque, suivant la déclaration, les demanderesses se disent venir par représentation et non par la substitution créée par leur bisaïeule, et non comme dérivant des droits successifs de Joseph Magloire, leur père, par l'acte duquel elles ne sont pas liées, n'étant pas ses héritières, vu qu'elles ont renoncé ; et, en outre, les droits qu'elles réclament, elles disent les tenir de leur bisaïeule, et non de leur père qui n'a jamais eu de droits,

attendu qu'il est mort avant l'ouverture de la substitution. Il ne reste plus qu'à voir si les demanderesses ont droit à un septième dans le tiers ou un septième dans une moitié. Cela dépend de l'interprétation de la clause de la donation qui veut que, " dans le cas de la mort du donataire sans enfants, la jouis-" sance des biens ira à ses frères et sœurs, et, si, au décès du do-" nataire, sans enfants, tous ses frères et sœurs étaient décédés, " la propriété retournera et appartiendra à leurs enfants nés " et à naître en légitime mariage." Aux termes de la donation, Benjamin étant mort, la donatrice ne référait pas à lui, cela est évident, lorsqu'elle ordonnait que la propriété retournât et appartint aux enfants qu'elle indique; ces enfants, c'était les enfants des frères et sœurs auxquels la donatrice référait dans la première partie de la phrase; elle ne pouvait pas référer à Benjamin, c'est évident, il était mort alors. C'est donc, comme l'a observé le savant conseil des demanderesses, comme si elle eût appelé nommément les frères et sœurs de François-Xavier, vivant lors de la donation, c'est-à-dire comme si elle eût dit que la propriété, dans le cas supposé, irait en jouissance à Jean-Baptiste, Julie et Marie-Josephte. C'est à leurs enfants seulement, qu'à leur décès, les biens donnés doivent aller en propriété, les enfants de Benjamin me paraissent en être exclus. Il n'est commis par là aucune injustice, car, peu de jours après la donation du 14 mai 1827, la donatrice en fit une autre [elle est au dossier] aux enfants mineurs de Benjamin, qui y reçoivent leur part en propriétés dans lesquelles, va sans dire, les enfants des autres branches ne pouvaient et ne peuvent avoir aucune espérance de partager. Le résumé de ce délibéré est que les demanderesses sont fondées en leurs conclusions: et que les exceptions du défendeur ne l'étant pas, elles doivent être déboutées. Il s'ensuit, à mon point de vue, que le jugement dont est appel est mal fondé et doit être infirmé, le défendeur doit être débouté de ses exceptions péremptoires, et les demanderesses dont l'action a été déboutée, obtenir les conclusions de leur déclaration, sauf cependant pour les dommages réclamés, pour lesquels il n'y a pas de preuve. Je pense qu'il serait nécessaire de négativer les différents motifs du jugement dont est appel.

BERTHELOT, J.: L'on a vu que, par leur déclaration, les demanderesses réclament par représentation de leur père, Joseph-Magloire Castonguay, fils de Jean-Bte et petit-fils de la donatrice, Marie-Josephte Saint-Germain, Joseph-Magloire Castonguay étant décédé le 11 janvier 1860, avant son oncle, F.-X. Castonguay, dont le décès a donné ouverture à la substitution, F.-X. Castonguay étant mort sans enfants. Par les défenses, il est prétendu, en second lieu, que d'après la règle de droit qui veut qu'en substitution fidéicommissaire il n'y ait

pas lieu à la représentation, les demanderesses ne peuvent réclamer du chef de leur père, Joseph-Magloire Castonguay, qui est le représentant, suivant Pothier, vol. 5, page 550, qui dit : " Le substitué, avant l'ouverture de la substitution, n'a, par " rapport au bien substitué, aucun droit formé, mais une " simple espérance, d'où il suit que, si le substitué meurt, avant " l'ouverture de la substitution, il ne transmet rien à ses héri- " tiers, et la substitution devient caduque, car, n'ayant aucun " droit avant son ouverture, l'*espérance s'évanouit par sa* " *mort.*" Ce moyen était tellement péremptoire que les demanderesses ont cru devoir ou pouvoir, par leurs *réponses spéciales*, réclamer et fonder leurs prétentions sur l'acte de donation du 14 mai 1827, en maintenant qu'elles étaient appelées à recueillir en vertu de la disposition contenue dans la donation dans les termes suivants : " 1° La donatrice désirant conserver aux " enfants à naître en légitime mariage du donataire *seulement*, " la propriété pleine et entière des biens ci-dessus désignés, " sans l'étendre à un degré plus éloigné, veut et entend que " les biens ci-dessus donnés en jouissance au donataire de- " meurent substitués, comme elle les substitue, par les pré- " sentes, aux enfants à naître en légitime mariage du donataire " *seulement*, auxquels elle donne la propriété desdits biens, ce " qui a été accepté pour eux par le donataire, leur père, vou- " lant et entendant que ceux qui sont appelés à la présente " substitution soient saisis des biens ainsi substitués aussitôt " que le cas de la substitution sera *avenu*, sans qu'ils soient " obligés d'en faire demande en justice. 2° Et, dans le cas de " mort du donataire, sans enfants, la *jouissance et usufruit* " des biens à lui présentement donnés seront reversibles à ses " frères et sœurs, ou à aucun d'eux, pour par eux en jouir " leur vie durante. 3° Et, si, au décès du donataire, sans en- " fants, tous ses frères et sœurs étaient décédés, la propriété " desdits biens retournera et appartiendra à *leurs enfants* nés " et à naître en légitime mariage, pour être partagés par " souche." Les demanderesses ne pouvaient pas ainsi, par leurs *réponses spéciales*, en invoquant la donation comme leur titre direct et immédiat, réussir sur leur action lorsqu'elles avaient, par leur déclaration, prétendu qu'elles réclamaient par *représentation de leur père décédé.* C'était un droit différent, bien que, pour exercer l'un et l'autre, elles doivent invoquer la donation. Dans un cas, c'était un droit qui leur résultait de la loi ; dans l'autre, leur droit résultait de la disposition de la donation en leur faveur. Je ne vois aucunement que, dans les expressions et les termes ci-dessus, la donatrice ait voulu exprimer, ainsi que les demanderesses le prétendent, que les biens donnés fussent déférés suivant l'ordre des successions légitimes, et qu'il faille, pour l'interprétation de sa volonté, aller

à l'encontre de la règle de droit contenue à l'article 937 du Code Civil. Ordonnances des substitutions ; Thevenot Dessaules ; Ricard. Il n'y a, dans la disposition ci-dessus rapportée, rien qui puisse nous justifier d'aller à l'encontre de la règle posée par l'article 937. La donatrice a voulu : 1° gratifier ses enfants au premier degré, après le décès du donataire, sans enfants, de la jouissance du bien donné. 2° Prévoyant le cas où, au décès du donataire, sans enfants, ses frères et sœurs pourraient être tous décédés, elle a voulu que " la propriété de " l'immeuble donné appartiendrait à *leurs* enfants nés et à " naître en légitime mariage, pour être partagés *entre eux* par " *souche.*" Dans la première partie de la clause, elle s'était servi deux fois du mot *seulement*, comme pour imprimer plus de force à sa volonté de faire le partage de la propriété des biens entre les enfants du donataire ; et, dans la deuxième partie, après avoir pourvu à ce que tous ses enfants, nés d'elle, eussent la jouissance du bien donné, à défaut d'enfants du donataire, elle a voulu que tous ses petits-enfants, enfants des frères du donataire, partageassent entre eux la *propriété* par *souche* ; elle s'est exprimée ainsi pour exclure entre eux le partage par tête ; elle avait le droit de le faire, et sa volonté me paraît clairement exprimée. Ceux de ses petits-enfants qui ont prédécédé le donataire n'ont rien à réclamer. Les motifs du jugement du 28 mars 1848 sont bien généraux, mais ils exposent généralement que les demanderesses ne peuvent réclamer en vertu de la donation du 14 mai 1827, par représentation de leur père, ni comme appelées directement à recueillir en vertu de la substitution créée par ladite donation. Je ne puis que concourir dans ces deux motifs qui auraient pu être exposés plus au long, sans cependant que ce soit nécessaire, et, je suis d'avis, pour les mêmes motifs, de confirmer le jugement de la Cour Supérieure en cette cause. Les demanderesses ne peuvent donc réclamer du chef de leur père, Joseph-Magloire, décédé avant son oncle François-Xavier, à la mort duquel, sans enfants, le bien donné est passé en propriété aux enfants survivants de ses frères et sœurs, pour être partagé, entre eux, dits enfants, par souche, selon la volonté de la donatrice.

Le jugement confirmé avait été rendu par le juge MONK dans les termes suivants : " La cour, considérant que les demanderesses ne sont pas en droit de réclamer la propriété, ou aucune partie de la propriété dont elles demandent la revendication ; considérant qu'elles ne peuvent en être déclarées propriétaires, ni par l'acte de donation du 14 mai 1827, ni par aucun titre produit au dossier, soit par représentation de leur père, soit comme *appelées* à la substitution dont il est question ; considérant que le défendeur, J.-L. Beaudry a établi, par une preuve légale et suffisante, les allégués de sa *défense* ; et, particulière-

ment, que, lors de l'institution de cette action, il était le seul et véritable propriétaire, en possession de l'immeuble revendiqué en cette cause, déboute les demanderesses de leur action." (1 *R. L.*, p. 93)

ACTION EN DENONCIATION DE NOUVEL ŒUVRE.

COUR SUPÉRIEURE, EN REVISION, Montréal, 9 juillet 1870.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

DORVAL *vs* CHEVALIER.

Jugé: Que, dans une action en démolition de nouvel œuvre, portée devant la Cour de Circuit, la valeur de la servitude doit être alléguée et prouvée ne pas dépasser $200, de manière à donner juridiction à la Cour de Circuit.

Le demandeur ayant porté son action en démolition de nouvel œuvre devant la Cour de Circuit du comté de l'Assomption, dans le district de Joliette, le défendeur plaida une exception déclinatoire, prétendant 1° que la Cour de Circuit n'a pas de juridiction dans cette matière; 2° que la valeur des choses et de tout ce qui est demandé par les conclusions du demandeur n'y est pas spécifiée, et qu'il n'y apparaît pas que la valeur ne dépasse pas la somme de $200; 3° qu'en réalité, la valeur des choses et de tout ce qui est demandé par les conclusions dépasse de beaucoup la somme de $200. Les conclusions du demandeur étaient 1° au paiement de $100 de dommages pour le passé; 2° à la démolition et à l'enlèvement d'une digue et d'obstructions sur un cours d'eau; 3° à défaut par le défendeur de ce faire, à la permission ou autorisation pour le demandeur de faire, ou faire faire lui-même, aux frais du défendeur, ces démolitions et enlèvement.

BEAUDRY, J.: L'action est portée pour le recouvrement d'une somme de $100, et, de plus, pour la démolition de certaines obstructions construites par le défendeur, lesquelles arrêtent l'écoulement des eaux qui traversent le terrain du demandeur, dont le niveau est plus élevé que celui du défendeur; ce dernier a plaidé une exception déclinatoire, prétendant que ce cumul des demandes du demandeur excède la compétence de la Cour de Circuit. Le demandeur prétend que non, qu'on ne doit considérer que les frais de démolition qui ne peuvent excéder $100, outre les dommages. Le défendeur, de son côté, dit qu'on doit considérer non pas seulement les frais que causera la démolition, mais encore la valeur de la chose à démolir; que, d'ailleurs, le demandeur n'ayant aucunement allégué

la valeur de cette démolition, la cause doit être considérée comme de la compétence de la Cour Supérieure, qui prend connaissance de toute cause qui n'est pas du ressort de la Cour de Circuit (C. P., art. 28), la juridiction de la Cour de Circuit étant restreinte aux demandes dans lesquelles la somme ou la valeur de la chose réclamée ne dépasse pas $200 (art. 1054). Pour que la Cour de Circuit puisse connaître d'une demande, il faut donc qu'il apparaisse que la somme ou valeur de la chose réclamée n'excède pas $200, autrement, la Cour Supérieure a seule juridiction. Ici, la demande réclame 1° $100 de dommages, et la reconnaissance d'une servitude (Code Civil, art. 501), en demandant la démolition de l'obstruction ou empêchement à l'exercice de cette servitude. Ce n'est donc pas seulement le coût de la démolition qui est demandé, mais la reconnaissance d'une servitude dont la valeur n'est pas alléguée et qui est indéterminée.

Le jugement déboutant l'exception déclinatoire, rendu le 26 octobre 1870, fut infirmé par la Cour de Revision dont le jugement est comme suit : " La cour, considérant que l'action portée par le demandeur contre le défendeur en démolition de nouvel œuvre, comporte une déclaration de servitude sur le fonds du défendeur en faveur de celui du demandeur ; que le demandeur n'a ni allégué ni prouvé que la valeur de cette servitude ne dépassait pas la somme de $200, de manière à donner juridiction à la Cour de Circuit, et qu'ainsi il y a erreur dans le jugement qui a débouté l'exception déclinatoire du défendeur, infirme ledit jugement, et, maintenant ladite exception déclinatoire, du défendeur, lui donne congé de la demande, avec dépens (1). (14 *J.*, p. 263)

DORION, DORION et GEOFFRION, avocats du demandeur.

PICHÉ, avocat du défendeur.

(1) Autorités du défendeur ; Dalloz, édition de 1825, tome 3, pp. 159, 283, 287 ; Dalloz, tome 4, v° *Degrés de juridiction*, pp. 612, 625, 710.

Le ch. 79 des S. R. B. C. de 1861, intitulé : " Acte concernant la Cour de Circuit," décrétait sec. 2 : " La Cour de Circuit connaîtra, entendra, jugera et décidera toutes les poursuites et actions civiles, tant celles dans lesquelles la Couronne est partie que les autres, (à l'exception de celles qui tombent purement sous la juridiction de l'Amirauté) dans lesquelles la somme d'argent ou la valeur de la chose demandée n'excède pas $200, et dans lesquelles il n'émane pas de bref de *capias ad respondendum*." Aux termes de cette section, la Cour de Circuit est incompétente à connaître d'une action ayant pour objet la réclamation d'une pension alimentaire de $200 par année, pour un espace de temps indéterminé, savoir la vie durante de celui qui la réclame. Art. 1054 C. P. C. (*Smith et ux.* et *Patton*, C. B. R. en appel, Montréal, 7 décembre 1863, LAFONTAINE, J.-P., MEREDITH, J., MONDELET, J., et BADGLEY, J., infirmant le jugement de C. C., 28 mai 1863, LAFONTAINE, J., qui, dans une telle demande, avait accordé $112 par année, 14 D. T. B. C., p. 323, et 13 R. J. R. Q., p. 52)

DECRET.—PROCEDURE.

COUR SUPÉRIEURE, EN REVISION, Montréal, 31 mai 1870.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

MORRISON *vs* CYR, *et* PERRON, mis en cause.

Jugé : 1° Que le shérif ne peut pas obliger un enchérisseur de renouveler la déclaration du lieu de sa résidence à chaque enchère qu'il fait. (1)
2° Que le shérif n'a pas le droit de recevoir une contestation sur telle déclaration de résidence faite par un enchérisseur.

BEAUDRY, J. : David Cyr a mis une enchère de $3400. Perron a mis une surenchère de $3450. Le député shérif, sous prétexte que Perron ne voulait pas déclarer son lieu de résidence, a refusé de lui adjuger l'immeuble et l'a adjugé à Cyr. Sur requête de la demanderesse, pour folle enchère contre Cyr, ce dernier a contesté la demande, en alléguant qu'il n'avait pas été le plus haut et dernier enchérisseur, puisque Perron avait mis une surenchère, et que l'immeuble aurait dû lui être adjugé, puisque le député shérif avait déjà reçu son enchère deux fois et pris sa déclaration de résidence. La cour maintint cette contestation et ordonna d'amender le rapport du shérif, de manière à déclarer Perron dernier enchérisseur et adjudicataire, et, sur requête de la demanderesse pour vente à la folle enchère de Perron, la Cour Supérieure, dans le district d'Iberville, par le jugement dont est appel, ordonna cette revente à la folle enchère. Il me semble qu'il y a erreur dans ce jugement ; le shérif a été en faute en refusant l'enchère de Perron et en adjugeant l'immeuble à Cyr, Perron ayant, lors de sa première enchère, déclaré sa résidence, ainsi que constaté au procès-verbal d'enchère, et n'étant pas tenu de renouveler cette déclaration à chaque enchère, et le député shérif n'avait pas droit d'en recevoir la contestation : il aurait dû adjuger l'immeuble à Perron. Il a manqué son devoir, et Perron dont l'enchère a été refusée se trouvait libéré de l'engagement qui en résultait. Je considère que l'enchère offerte par un enchérisseur n'a plus d'effet, aussitôt que l'adjudication a eu lieu, et, la séance levée, il ne peut plus être tenu. C'est ce qui résulte des arts 674, 683 et 686 C. P. C.

Le jugement de la Cour de Revision, infirmant le jugement de la Cour Supérieure du district d'Iberville, rendu le 19 novembre 1869, qui avait décrété la folle enchère contre le mis en cause, est motivé comme suit : " The court, considering that there is error in the said judgment, in rejecting the contesta-

(1) Art. 674 C. P. C.

tion by *mis en cause* of the *demande* made against him to have the land seized resold at his *folle enchère*, and in so far as ordering resale at his *folle enchère*, in manner and form expressed in said judgment, doth, revising said judgment, reverse the same, and, proceeding to render the judgment that ought to have been rendered in the premises; considering that Perron was not accepted, at the sheriff's sale referred to, as last *enchérisseur* for said land seized *super* defendant, or as a purchaser thereof; considering that Perron's *réponse* to plaintiff's *requête* against him was and is well founded; doth maintain said *réponse* of Perron and doth reject plaintiff's *requête*. (14 *J.*, p. 265)

DÉCARY, avocat de la demanderesse.

LEBLANC et CASSIDY, avocats du mis en cause.

DEPOSIT IN COURT.

SUPERIOR COURT, Montreal, 30th June, 1869.

Coram BERTHELOT, J.

BUTTERS *vs* THE BANK OF MONTREAL, and STEELE *et al.*, intervening parties.

Held: That money specially deposited at interest in a chartered bank, by consent, and under the sanction of the court, in the name of the prothonotary, and subject to the future order of the court, or of a judge thereof, cannot be legally withdrawn and used by the prothonotary without such order.

This was a rule on the prothonotary, to compel that officer to deliver and endorse to plaintiff (by consent of the parties) a special deposit receipt for the sum of $3,887 granted by the Merchants Bank of Canada, on the 28th of October, 1868, payable with 5 per cent. interest, to the order of the prothonotary, and, in default, to pay the amount, with the interest to plaintiff. The money had been so deposited in the name of the prothonotary, by consent of the parties and under the sanction of the court, until the further order or judgment of the court. Immediately on being handed the deposit receipt, the prothonotary cashed it, and, in showing cause against the rule, the prothonotary contended he had a right to do so, and to retain the interest. The court thought otherwise and ordered the prothonotary forthwith to pay plaintiff the amount of the deposit, and all the interest that ought to have accrued thereon, had the money been left in the bank. Rule against the prothonotary absolute. (14 *J.*, p. 266)

J. J. C. ABBOTT, Q. C., for plaintiffs.

BARNARD and PAGNUELO, for prothonotary.

OBLIGATIONS DU LOCATAIRE.

COUR DE CIRCUIT, Montréal, 16 août 1870.

Coram BEAUDRY, J.

GAREAU *vs* PAQUET.

Jugé : Qu'un locataire n'est tenu d'avoir dans la maison louée que les meubles suffisants pour répondre d'un terme de sa location. (1)

Le demandeur intente contre le défendeur une action en résiliation de bail, sur le motif que le défendeur ne garnit pas de meubles suffisants la maison louée. Le loyer est de $3.50 par mois, payable mensuellement. Le défendeur plaide que la maison est suffisamment garnie. A l'enquête, il est prouvé qu'il y a dans la maison louée des meubles pour la valeur d'environ $14.00, dont partie appartiennent à un sous-locataire.

PER CURIAM : Le locataire n'est tenu d'avoir que les meubles qu'il faut pour garantir un terme du bail et les frais d'une action en expulsion. Dans la présente action, le terme est un mois, et il a été établi que le défendeur avait, tant par lui que par le sous-locataire, des meubles pour la valeur d'environ $14. Cela suffit. L'action doit donc être déboutée. Jugement pour le défendeur. (2) (14 *J.*, p. 266 ; 2 *La Thémis*, p. 27)

JETTÉ, ARCHAMBAULT et CHRISTIN, pour le demandeur.

DEBELLEFEUILLE et TURGEON, pour le défendeur.

PROCEDURE ON CERTIORARI.

SUPERIOR COURT, Montreal, 28th June, 1870.

Coram TORRANCE, J.

Ex parte WHITEHEAD, petitioner for a writ of *certiorari, and* A. BRUNET, Prosecutor.

Held : That, upon the inscription for hearing on the merits of the cause under the writ of *certiorari*, a motion to quash the conviction is necessary. Art. 1231 C. C. P.

The writ of *certiorari* was returned with the papers and conviction. On the 29th April, 1870, petitioner inscribed the

(1) V. art. 1624 C. C.

(2) Autorités citées par le défendeur : 2 Troplong, *Louage*, n° 531, p. 316 ; 6 Marcadé, sur l'art. 1752, p. 510 ; 3 Mourlon, *Répétitions sur le Code Napoléon*, n° 773 ; 2 Bourjon, p. 46, n° 27.

case upon the *rôle de droit*, for hearing on the merits the 17th May, 1870. On the 17th May, 1870, petitioner was heard on the merits, the prosecutor not appearing. The court, afterwards, discharged the case from *délibéré*, as no motion to quash the conviction had been made. The inscription did not do away with the necessity for a motion to quash, which was like the conclusion of a declaration. (14 *J.*, p. 267)

PERKINS and RAMSAY, attorneys for petitioner.

PROCEDURE ON CERTIORARI.

SUPERIOR COURT, Montreal, 30th October, 1870.

Coram BERTHELOT, J.

Ex parte WHITEHEAD, petitioner for a writ of *certiorari*.

Held: That the hearing on the merits of the cause under the writ of *certiorari*, must be had in one of the two divisions of the court for the hearing of cases on the merits.

On the 27th October, 1870, a motion was made to quash conviction. Judgment ordering the inscription to be carried to one of the divisions for hearing of cases on the merits. (15 *J.*, p. 43)

PERKINS and RAMSAY, attorneys for petitioner.

PREUVE.—POSSESSION DE MEUBLES.

COUR SUPÉRIEURE, EN REVISION, Montréal, 30 avril 1870.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

LEFEBVRE *vs* BRUNEAU.

Jugé : Que la possession, en fait de meubles, équivaut à un commencement de preuve par écrit, suffisant pour permettre au possesseur d'expliquer sa possession par une preuve testimoniale. (1)

Le demandeur, par son action, réclamait du défendeur la valeur d'un cheval ($120) qu'il lui aurait donné en gage, pour sûreté de la somme de $31. Il alléguait qu'il avait offert de remettre cette somme au défendeur qui a refusé de lui remettre son cheval, et que le cheval était, depuis, mort par la faute du défendeur. Le défendeur plaida qu'il n'avait pas eu

(1) V. art. 2268 C. C.

ce cheval en gage, mais qu'il l'avait acheté du défendeur pour $63, savoir $31 en argent payé comptant, et la balance par autant que lui devait le demandeur pour effets, que ce cheval ne valait que $60, et qu'il est mort par cas fortuit et force majeure. Le défendeur a été entendu sur faits et articles. Le demandeur a ensuite voulu faire entendre des témoins pour prouver ce contrat de gage, nonobstant les dénégations du défendeur sous serment. Le défendeur s'objecta à l'enquête et son objection maintenue (MONDELET, J.). Au terme suivant, le demandeur interrogea le défendeur, comme témoin, qui nia encore le contrat de gage. Le demandeur tenta encore de faire entendre des témoins, le défendeur fit la même objection, et le juge présidant aux enquêtes (TORRANCE, J.) permit la preuve sous réserve. Alors le défendeur, à son enquête, produisit un témoin et lui posa la question suivante : " Le 15 août de ladite " année, veuillez dire en vertu de quelle convention interve- " nue entre le demandeur et le défendeur, ce dernier est " devenu en possession de la jument en question ? " Le demandeur s'y objecta, prétendant que la preuve testimoniale n'était pas admissible, vu que le défendeur voulait prouver un contrat pour une somme excédant $50. Le juge présidant aux enquêtes (BERTHELOT, J.) maintint l'objection. C'est cette décision qui fut soumise à la Cour de Revision. Le défendeur soumit que le fait de la possession du cheval formait en sa faveur une présomption de droit de propriété assez forte pour lui donner droit de prouver son titre par témoins. Il cita 12 Marcadé, *Presc.*, art. 2280, s. 2, p. 357 ; 1 Duplessis, *Exécutions*, liv. 2, p. 618 ; Bourjon, vol. 2, p. 691, tit. 8, ch. 2, sec. 91 ; Pigeau, vol. 1, p. 210, liv. 2, s. 2, tit. 2. La Cour de Revision a rejeté l'objection faite à l'enquête par le demandeur à la question posée comme ci-dessus, sur le principe que la possession du cheval, par le défendeur, équivalait à un commencement de preuve par écrit. Jugement infirmé. Objection à l'enquête rejetée (1). (14 *J.*, p. 268)

ROBIDOUX, avocat du demandeur.

DUHAMEL et RAINVILLE, avocats du défendeur.

(1) 9 Toullier, n° 94, p. 168 ; Merlin, Rép., v° *Saisie revend.*, art. 8.

EXPROPRIATION.—CORPORATION MUNICIPALE.—RESPONSABILITE.

COUR DU BANC DE LA REINE, EN APPEL,
Montréal, 22 juin 1872.

Présents : CARON, J., BADGLEY, J., MONK, J., et CASAULT, J.

HENRI JUDAH, demandeur en cour de première instance, appelant, *et* LE MAIRE, LES ECHEVINS ET LES CITOYENS DE LA CITÉ DE MONTRÉAL, défendeurs en cour de première instance, intimés.

Jugé: Qu'une corporation municipale qui, dans l'exercice de son droit d'exproprier un terrain requis pour l'élargissement d'une rue, procède à l'exécution des travaux entrepris pour cet objet avec une lenteur et une négligence préjudiciables au propriétaire de la partie du terrain non expropriée et imputables à faute et abus de pouvoir, et qui, par là, cause à ce propriétaire, indépendamment de la perte de son terrain pour laquelle il a été indemnisé, des dommages, ce dernier a le droit de les recouvrer de la corporation. Ainsi, une corporation municipale qui exproprie partie d'un terrain pour l'élargissement d'une rue et ne procède pas avec diligence à remettre la rue en bon état et, par là, cause des dommages au propriétaire en le privant du loyer de bâtisses par lui construites sur le reste du terrain, est responsable des dommages ainsi causés.

Le jugement de la Cour Supérieure a été rendu le 9 juillet 1870, TORRANCE, J. Ci-suivent les remarques de l'Hon. Juge TORRANCE et le jugement de la Cour Supérieure.

TORRANCE, J. : This is an action of damages, by a proprietor of real estate, in Montreal, against the city corporation. The declaration sets forth that plaintiff, on the 3rd July, 1867, was and, for 20 years thereto previous, had been the owner of a lot of land and house, in Little St. James street, in Montreal; that, on the 3rd July, 1867, defendants resolved to widen the said street, and, for that purpose, to expropriate and acquire a strip of land on the north side of the said land; that, on the 9th November, 1867, they gave notice that they would apply on the 28th December, 1867, to one of the judges of the Superior Court, for the nomination of three commissioners, to fix the compensation to be allowed for the widening of said street, including a portion to be taken from said lot; that commissioners were duly appointed and reported on the compensation to be allowed, and their report was duly confirmed on the 12th May, 1868; that, by said report, plaintiff was awarded $6924.01 as compensation; that, on the 27th May, 1868, defendants deposited the said sum of $6924.01 in the hands of the prothonotary, and the said strip of land was vested in defendants, who then entered upon and took possession of the same: that plaintiff remained in possession of the

residue of said land; that the commissioners appointed assessed the cost of the improvement upon the real estate which they determined to be benefited thereby, and the share of plaintiff of the said assessment amounted to $2759.40, and that he paid the same on the 9th October, 1868, thus reducing the amount of his indemnity to $4164.61; that plaintiff's property was assessed upon its value in view of the said improvements, and that his assessments amounted to these large sums, by reason of and in consideration of the increased value which, it was supposed, the widening of Little St. James street, and making it uniform with Great St. James street and widening Place d'Armes Hill, would give to the same; that defendants, by a by-law, resolved to lower the level of the street, and they, forthwith, cut down to the new level the width of the new portion of the street, but they left the roadway of the old portion of the street, and the sidewalk on the south-east side on the old level, thus giving two levels to the same street, and that the new level is four feet lower than the old one; that, immediately after the establishment of the new level, plaintiff began building on the residue of his property a first class cut stone store, and completed the same before the 1st February, 1869, in order to lease it, and make it productive from the 1st May, 1869, and he expended in its construction $14,000; that he has been deprived of one year's rent from 1st May, 1868 to 1st May, 1869, by the expropriation; that the said residue and new building have been assessed for the current year, from the 1st May, 1869, at a valuation of $16,000 and a rental of $240, and the municipal and school assessments for the said year amount to $54, and have been paid by plaintiff to defendants; that he has fulfilled his obligations arising from his ownership towards defendants, but defendants have not fulfilled their obligations arising from the widening of the street, and the alterations in the level thereof, towards the public and plaintiff, thereby leaving plaintiff, since the 1st of May, 1868, to the present time without any rent or profit from his property, but during which he has had two yearly assessments amounting to $111.25 levied on him as proprietor thereof, exclusive of the assessments for widening the street and Place d'Armes Hill; that defendants, after having taken possession, were bound, with all possible despatch, to level the street, and to make and pave the roadway; and lay down sidewalks, and to give, for the residue of the properties of the persons expropriated, an unobstructed and good street, to and from which access might at all times be had; that defendants have constantly and wilfully *neglected* to put the street into good order, and pave the same and to lay a sidewalk on the north-west side thereof; and that,

in the month of September, 1868, they put up a fence five feet high in the line between the two levels, from one end of the street to the other; that the whole of the width of the new level, since September, 1868, hath been and is now impeded and obstructed by piles of stone, &c., by reason whereof, all passage through the new level with vehicles hath been and is prevented, and that is difficult, and even dangerous, for pedestrians to pass through or along the same, and no thoroughfare has been established; that, in consequence, the building of plaintiff has been entirely cut off and isolated from the rest of the city, and plaintiff, by reason thereof, and of the negligence of defendants, hath been unable to lease the same and has lost the rent for the current year; that, before the expropriation, plaintiff's property yielded him a net revenue of $916, and he should now obtain from the new building a net revenue of $2000 per annum; that plaintiff, in consequence of the gross fault of defendants, has suffered great damage by the widening of the street, and will also lose the interest on the sum of $9835.39, being the surplus of his outlay over the net amount of the indemnity received by him, and on the taxes paid by him; that the damages sustained by plaintiff amount to $2000, which he is entitled to obtain from defendants. The defendants met the action by a first plea which averred that, at the request of plaintiff and others, they resolved to widen the street; that, in all their proceedings, they acted according to law and have used due diligence and care in carrying out the improvement; that, on the 28th of August, 1868, at the request of plaintiff and others, they resolved, by a by-law, to lower the level of the street, and, in all their proceedings in lowering the level, they acted according to law and used all care and diligence; that, in the amount of $6924 paid to plaintiff was included indemnity for all damages sustained by him arising from the widening of the street, &c.; that the said award was, on the 12th May, 1868, homologated and confirmed by the judge, and accepted by plaintiff; that, by by-law chap. 29, sec. 7, persons erecting buildings may have a portion of the street opposite their building, not exceeding one-third of the width of the street, allotted to them, on which they may put building materials; that, since the 24th August, 1868, plaintiff and other proprietors have encumbered the portions of said street allotted to them with building materials; that, owing to the erection of buildings on both sides of plaintiff, his building, even if completed, which defendants deny, was valueless as a shop and dwelling through no fault of defendants; that, when plaintiff instituted the present action, his building was in an incomplete and unfinished state and untenantable; that, even, if Little St. James street had been

graded tn May, 1868, plaintiff could not have leased his building, the houses on both sides being still in an unfinished state; that, in the winter and spring of 1869, there were many buildings similar to plaintiff's in better business streets for which tenants could not be obtained, inasmuch as there were more of such buildings than were required in the city. To sum up: The plaintiff claims from defendants $2000 damages, sustained by him from the neglect of defendants to fulfil the obligations which he alleged they were under, with all despatch, to level the street, and to make and pave the roadway, and lay down sidewalks, and to give, for the residue of the properties of the persons expropriated, an unobstructed and good street, to and from which access might at all times be had. The defendants have argued, that there was no contract at all between plaintiff and defendants. They say that they are a government and legislature; that they have legislative powers which they hold for public purposes and as part of the government of the country, and that they enjoy the exemption of the government from responsibility; that plaintiff is one of the corporation, and that they are not bound to put a sidewalk at all. The expropriation is a thing by itself and uncomplained of, and was paid for. The street had become a new street. There was here *damnum absque injuria.* Angell, *Highways,* S. 211-217. Here was an attempt by an individual to coerce a corporation in the exercise of their legislative functions. Was there an action on the case by a private individual? The Act of 1866 (29 and 30 Vic., c. 56, s. 11) provided that proprietors interested in an improvement might object to the improvement being carried out. For the construction of a footpath, by 27 and 28 Vic., c. 60, s. 27, a resolution of the council was necessary, and it could be made at the expense of the proprietor. 4 D. and E. Rep., p. 794, *The Governor and Company of the British Cast Plate Manufacturers* vs *Meredith et al.*; Abbott's Dig. Law of Corporations, p. 500, n°s 185, 186; p. 501, n° 201; Sherman and Redfield, on Negligence, §§ 121, 153. This last authority, § 127, reads as follows: "A large part of the functions of a city corporation are legislative or governmental; and necassarily a wide discretion is confided to it in determining the means of accomplishing its ends, and the courts will not supervise that discretion. Otherwise, if the courts could by writ of *mandamus* or other process compel the opening and paving of streets, building of sewers, &c., not in conformity with the views of local officers, inextricable confusion in the administration of government would ensue. For the duty of building public works of this kind is one requiring the exercise of deliberation, judgment and discretion. It admits of a choice of means, and the determination of the

order of time in which such improvements shall be made. It involves also a variety of prudential considerations relating to the burdens which may be discreetly imposed at a given time, and the preference which one locality has over another. Hence a municipal corporation is liable neither for an omission to exercise its discretion as to a particular matter, nor for the consequences of its lawful exercise." The court, on the question of the liability of defendants on the issues raised between the parties, is with defendants. The action is, therefore, dismissed.

The *motifs* of the judgment are as follows: "The court, considering that defendants, in the expropriation made of plaintiff's property, in Little St. James street, and in the widening and lowering of the level of said street, acted according to law; considering that defendants, in causing damage to plaintiff, by said expropriation, did not exceed the powers conferred upon them by the statutes in such case made and provided; considering that the damage caused by said expropriation was paid for by the award of the court appointed for that purpose; considering that plaintiff hath not proved that defendants were under obligation to plaintiff, with despatch, to level the street, and make and pave the roadway, and lay down sidewalks, and to give to the residue of the properties expropriated an unobstructed and good street, to and from which access might at all times be had; considering, on the whole, that plaintiff hath failed to prove the material allegations of his declaration; doth dismiss the action and *demande*."

La cour d'appel a infirmé ce jugement par le jugement suivant: "La Cour, considérant que la corporation de Montréal, dans l'exercice de son droit d'exproprier l'appelant du terrain requis pour l'élargissement de la petite rue Saint-Jacques, a procédé à l'exécution des travaux entrepris pour cet objet avec une lenteur et une négligence préjudiciables à l'appelant et imputables à faute et abus de pouvoir, et, en ce faisant, a causé à l'appelant, indépendamment de la perte de son terrain pour laquelle il a été indemnisé, des dommages dont il a droit de recevoir l'équivalent; considérant qu'il est établi que la corporation, au lieu de procéder avec la diligence, le soin et l'attention auxquels elle était tenue, a obstrué la voie publique, sans nécessité, pendant un laps de temps considérable et plus que nécessaire, et l'a tenue dans un état impassable, privant le demandeur de la faculté de s'en servir, ce qui lui a causé les pertes et dommages dont il se plaint en sa déclaration; casse et annule le jugement rendu par la Cour Supérieure, à Montreal, le 9 juillet 1870, lequel est entaché d'erreur, et, procédant à rendre le jugement qu'aurait dû rendre ladite cour,

renvoie les exceptions et autres défenses de la corporation, maintient l'action du demandeur appelant jusqu'à concurrence de la somme de $1000, laquelle somme elle condamne la corporation à payer au demandeur, avec intérêt du jour de l'assignation en cour de première instance." L'honorable M. le juge CASAULT diffère quant au montant des dommages qu'il est d'avis de réduire à la somme de deux cent cinquante piastres. (14 *J.*, p. 269, et 2 *R. C.*, p. 470)

JUDAH and WURTELE, for appellant.

STUART and ROY, for respondents.

Marine Insurance.—Policy.—Breach of Warranty.—Abandonment of Ship.—Constructive Acceptance of Notice of Abandonment.—Acceptance of Notice makes a Liability as for Total Loss.—It also prevents Insurers from relying on a Breach of Warranty.—Agent.

PRIVY COUNCIL, 26th June, 1874.

Coram Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

THE PROVINCIAL INSURANCE COMPANY OF CANADA, appellants, *and* JOEL LEDUC, respondent.

If notice of the abandonment of a ship is given by the insured to the insurers, and the insurers then say and do nothing, the conclusion is that they do not mean to accept the abandonment. But if they, by their agent, take possession of the ship, and then repair it and retain it in their possession for some time, without repudiating the notice or informing the insured as to the character in which they are acting, then there is a constructive acceptance of the abandonment by the insurers. And a constructive acceptance produces the same effect on the rights of the parties as an express acceptance.

Where the agent who took possession of the ship, &c., was instructed to look after the interests of the insurance company, his acts in pursuance of those instructions, coupled with the non-repudiation of the notice of abandonment, having been such as to be evidence from which an acceptance might be inferred, the company was bound by his acts.

After the acceptance by the insurers of the abandonment of a ship they become liable as for a total loss.

Where a ship-policy contained a provision that the ship should not be within the Gulf of Saint-Lawrence within a prescribed period, and the ship went into the gulf within the prohibited time and was wrecked; and notice was given of an abandonment and was accepted by the insurers; it was contended by them that the ship was not insured when she was lost, as the insurance did not extend to a loss in the gulf within the prohibited time, and that an abandonment can be of no avail where there is no insurance. However it was held that the vessel was in fact insured, and that the loss occurred during the time and upon a voyage described in the policy, but there was a breach of one of the warranties; and if, after a constructive total loss and notice of abandonment, the

insurers, with full knowledge of all the facts, accept the notice, they cannot, when called on to pay the amount insured, resile and rely on a breach of warranty. By the voluntary acceptance of a notice of abandonment, an agreement is intered into which closes the whole matter.

An agent who insures for another with his authority may sue for the sum assured in his own name.

Interpretation of a clause in a marine policy as to a prohibition of the ship from being in the Gulf of Saint-Lawrence within a prescribed period.

This was an appeal from two concurrent judgments of the Court of Queen's Bench for the Province of Quebec, of the 22nd of March, 1872; one of which modified on appeal a judgment of the Superior Court for the Province of Quebec of the 31st of March, 1870, MACKAY, J., in favour of respondent, by increasing the sum for which judgment was given for respondent, and condemning appellants to pay the full amount claimed and costs; and the other of which dismissed with costs the appeal of appellants. The judgments were given on an action brought by respondent against appellants on a policy of insurance for $5000, which had been effected on a ship called the *Babineau and Gaudry*. The respondent was a merchant of Montreal; appellants were an insurance company carrying on business at Toronto. and having agents at Montreal and other places in Canada. The ship had been sold to respondent and one Benjamin Vigneau, in March, 1866, for £1400, and had then been and still remained registered in their joint names. Vigneau was unable to provide his moiety of the purchase-money, and the whole was accordingly paid by respondent. Vigneau had now died, but his brother stated that Vigneau had told him that he was indebted to respondent, and that, to give him security for what he owed him, he had authorized respondent to insure the vessel in his own name, so that, if the vessel perished, respondent might receive the amount assured, and so pay himself the debt. On the 3rd of January, 1867, respondent insured the ship with appellants for $5000. The policy was, as far as is material. in these terms: "J. Leduc, of Montreal, province of Quebec, as well in his own name as for and in the name and names of all and every other persons to whom the same doth, may, or shall appertain, in part or in all, doth make insurance and cause to be insured, lost or not lost, the sum of $5000 upon the body, tackle, apparel, and other furniture of the good schooner *Babineau and Gaudry* whereof is master, for the present voyage, Benjamin Vigneau, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel or the master thereof is or shall be called. Beginning the adventures upon the said vessel, tackle, apparel, &c., at and from Montreal, to trade between the Island of Newfound-

land, Nova Scotia, West India Islands, Cuba, safe ports in the United States and Quebec and Montreal, to and from ports in the Lower Provinces; risk commencing at noon on the 15th of December, 1866, and ending at noon on the 15th December, 1867. And it shall and may be lawful for the said vessel in her voyage to proceed and sail to, touch and stay at any port or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said vessel, tackle, &c., hereby insured are valued at $7000. And it is agreed that, in case a total loss shall be claimed for or on account of any damage or charge to the said vessel, the only basis of ascertaining the value shall be her valuation in this policy; and if not valued herein, then her actual value at the time of the inception of this risk at the port to which she then belonged. Not allowed under this policy to enter the gulf of St. Lawrence before the 25th day of April, nor to be in the said gulf after the 15th day of November. Nor to proceed to Newfoundland after the 1st day of December or before the 15th day of March without payment of additional premium and leave first obtained; war risk and sealing voyages excepted." At the time of the insurance the ship was at the port of Saint-John, Newfoundland, preparing for a voyage to the West Indies, which she subsequently completed. On the 16th of November, 1867, the day after the date fixed by the policy as the last day on which the ship was to be in the gulf of Saint-Lawrence, the *Babineau* and *Gaudry* sailed from Montreal, on a voyage to the port of Saint-John, Newfoundland; and, on or about the 1st of December, 1867, while still in the gulf of Saint-Lawrence, she was overtaken by a violent storm and totally lost on the Island of Anticosti. The whole of the crew were drowned, and news of the wreck did not reach respondent until the 18th of May, 1868. On the following day, he served on appellants' agent at Montreal, McCuaig, a notarial protest, which contained a claim for payment of the full sum insured, $5000, and also a formal abandonment of the wreck to the insurance company. The protest was as follows: "At the special instance of Joel Leduc, I, the undersigned notary public, went to the Montreal office of the Provincial Insurance Company of Canada and made the following declarations, by way of notification, to the said insurance company, speaking to McCuaig, agent of the company: that the schooner *Babineau* and *Gaudry* belonging to Joel Leduc, insured against the perils and dangers of navigation at the said Provincial Insurance Company of Canada, Montreal branch, for the sum of $5000, under policy bearing date n° 28,964, and date as countersigned at Toronto, Ontario, the 3rd day of January,

1867, being tight, staunch and strong, well and sufficiently manned, provided, equipped and furnished with all things needful and necessary for a voyage, loaded with a general cargo of flour, peas, apples and others, left the port of Montreal, in the province of Quebec, on the 16th day of November, 1867, for the port of Saint John, Newfoundland. That Joel Leduc received information from Benoit Vigneau, the captain of the said schooner, by his letter dated Bic, the 27th of November, 1867; that all was right and well on board said schooner; that, since that date, Leduc heard nothing of and concerning said schooner up to yesterday the 18th instant, when he was told by Captain Edouard Vigneau, that he, said Vigneau, had seen one named Mathurin, the second on board the steamer Gaspé, who stated to him that the schooner *Babineau* and *Gaudry* had become a total wreck; that he had gone himself and been on the wreck about twenty miles below the west point of Anticosti Island, in the gulf, and was told that the crew was all lost; that a schooner or steamer had been sent to the wreck, had taken and saved about 700 barrels of flour, which had been transported to and sold at Gaspé, the rest of the cargo being lost, or perhaps could be found there yet; that it is supposed that the accident and wreck of the schooner *Babineau* and *Gaudry* happened and took place on or about and between the 1st and 5th day of December last past, 1867; that Leduc is ready and prepared to affirm upon oath all and every of the above facts. Under these circumstances and from the information received by Leduc, of the wreck of the schooner *Babineau* and *Gaudry*, and the general report since few days by the newspapers of this province of said wreck, and that two bodies of the crew had been found: "I, the said undersigned notary, did and do hereby, at the request aforesaid, notify and declare unto the Provincial Insurance Company of Canada that Leduc claims and demands, through my ministry, of and from the Provincial Insurance Company, the payment of the sum of $5000, being the amount of insurance of schooner *Babineau* and *Gaudry* under said policy of insurance; and that Leduc did and do hereby relinquish unto the Provincial Insurance Company, and abandon, from this day henceforth and forever, all and every the rights, claims, titles and interest, which he may or can have, demand or pretend into and upon the schooner *Babineau* and *Gaudry*, so wrecked as above stated; to all which J. F. McCuaig answered: 'I will submit to the company,' which answer I, the undersigned notary, have written and taken to serve and avail as occasion shall or may require. Protesting for all, I can protest in the premises, and to the end that the Provincial Insurance Company may not have cause to pretend and plead

ignorance in the premises, I, the said notary, have served said insurance company with an authenticated copy of these presents for notification thereof. This done and notified at the place, and on the day, month and year first above and before written, under the number twelve thousand." McCuaig forwarded the protest to the head office at Toronto, but there was some conflict of evidence as to whether it was received at once, or not till the 18th of June. In the middle of May, MacGregor, the company's marine inspector, received instructions to proceed to Anticosti, to look after the interests of the company. MacGregor stated in his evidence: "I went to the vessel, which I found about twenty miles from the lighthouse, near the centre of the island, on the south-west side. She was lying bottom up, with her bow out in the gulf, and her rigging, anchor and chains were lying just at her bow; there was a hole cut in her side for the purpose of taking her cargo out. I also found parts of the bodies of the men of the crew, and I am under the impression that all the men of the crew perished. From the appearance of the bodies and bones remaining, I have no doubt that they must have been drowned there. After ascertaining the state of the facts, I went back to Gaspé, and, on my arrival, I found the balance of what had been found on the cargo arrived there, sent by other persons on vessels chartered by Lloyd's agent for the purpose. I immediately advertised the sale of the goods saved for the benefit of the parties concerned; and I had this sale proceeded with as soon as possible, and the proceeds, after paying the expenses, were given to different parties having an interest, and the balance now lies in the hands of the company. After disposing of the cargo, I got material and men and went back to the island and took the vessel off, and brought her to Gaspé, where I left her and went home. After I got to Toronto, I endeavoured to get the salvage. When I found I could not, I went down in September and brought her up to Montreal, where she has since been sold. I do not know what price she brought. The expenses for salvage amounted to about $3000." The appellants proceeded against the ship in the Court of Admiralty, at Quebec, for the salvage expenses, which exceeded the value of the ship; and they obtained a decree awarding to them as salvors, $3300; the ship was sold by order of the Court of Admiralty, for $350, which appellants then received. MacGregor, the company's inspector, had no authority to accept a notice of abandonment, and the head office had no opportunity of communicating with him after he went to Anticosti until his return. The respondent claimed $5000 on the policy; but appellants refused to pay the sum, and thereupon the action was commenced on the 14th of November, 1868, for the

recovery of the amount. The appellants demurred to the declaration, on the ground that the policy contained a warranty that the ship should not be in the gulf of Saint-Lawrence after the 15th of November, and should not proceed to Newfoundland after the 1st of December; whereas the declaration showed that the ship was lost while in the gulf of Saint-Lawrence, after the 15th of November, and while proceeding to Newfoundland, after the 1st of December. On the 31st of March, 1870, the Superior Court at Montreal, MACKAY, J., gave judgment for $3500 (being the value of one-half of the ship, as stated in the policy), together with interest and costs, on the ground that appellants, having accepted the notice of abandonment, were estopped from setting up the alleged breach of warranty, and that respondent was entitled to recover only the value of his interest in the ship.

Here follow the remarks of Judge MACKAY in the Superior Court:

MACKAY, J.: La question d'interprétation de la clause de la police n'est pas sans difficultés. Mais, si l'acceptation du délaissement par la défenderesse a eu l'effet que prétend lui donner le demandeur, il est inutile d'aller plus loin. Ce délaissement est signifié le 19 mai 1868 à l'agent de la compagnie, à Montréal, et ce dernier envoie de suite l'acte au bureau principal à Toronto. Ce délaissement est fait en termes clairs et précis, et donne tous les détails de la perte du navire avec beaucoup de franchise. Avant le 24 du même mois, la défenderesse fait partir son agent MacGregor pour le lieu du naufrage, afin de surveiller ses intérêts. La défenderesse dit qu'elle ne connaissait pas alors le délaissement, et qu'elle ne l'a connu et n'a reçu la copie de l'acte qui le contient que le 18 juin, et qu'il lui a alors été envoyé de Québec par MacGregor. C'est le témoin Crocker, gérant de la compagnie, qui l'affirme. Mais ceci me paraît bien singulier, car MacGregor n'est pas allé à Québec dans le mois de juin. Lorsqu'il a demandé des renseignements et des papiers au bureau de Montréal, en mai, on lui a répondu que tout avait été envoyé à Toronto. Dans les premiers jours de juin, il se trouvait à Gaspé; le 15 juin, il était à Anticosti, d'où il est ensuite revenu encore à Gaspé. Comment pouvait-il, pendant ce temps-là, envoyer de Québec une copie notariée de l'acte de délaissement pour que cette copie arrive à Toronto le 18 juin? D'ailleurs, de qui MacGregor aurait-il eu cette copie? Il n'y en a eu qu'une de signifiée à la défenderesse, savoir celle laissée à McCuaig, et c'est précisément celle-là qui se trouve maintenant en la possession de la défenderesse. Comment la défenderesse a-t-elle pu avoir cette copie sinon de McCuaig lui-même, qui déclare l'avoir envoyée au bureau principal avant le 24 mai? Il y a donc lieu de croire que cet acte

de délaissement était connu de la défenderesse avant le 24 mai et avant que MacGregor fut parti de Montréal. De plus, ce même jour, 24 mai, le demandeur répète à MacGregor tout ce que contient l'acte de délaissement, MacGregor lui-même l'avoue. Le demandeur a donc ainsi renouvelé son délaissement à la défenderesse, et cela, sans aucune répudiation de cette dernière. La preuve établit clairement que le vaisseau était tellement brisé et endommagé que le demandeur avait parfaitement droit de le considérer comme totalement perdu et d'en faire l'abandon. Cet abandon était formel, contenait tous les détails du naufrage et était fait sans conditions. En vertu des dispositions de notre code, l'acceptation d'un tel délaissement rend l'assureur propriétaire absolu de la chose assurée. Quant à l'acceptation du délaissement, elle peut être explicite ou implicite. Les assureurs peuvent refuser d'accepter le délaissement, mais s'ils veulent refuser, ils doivent en donner avis. Dans l'espèce, la défenderesse aurait pu répudier le délaissement fait par le demandeur et s'en tenir aux arguments qu'elle a ensuite invoqués, savoir la violation des conditions de la police et par suite sa libération de son engagement. Mais la conduite de la défenderesse après le délaissement prouve contre elle. Il est parfaitement loisible aux assureurs de se départir des objections même valables qu'ils peuvent avoir à opposer à une réclamation, et les tribunaux apprécient souvent leurs actes comme comportant une telle renonciation. Ces questions se présentent tous les jours devant les tribunaux, et il en sera toujours ainsi puisqu'il s'agit ici non d'interprétation de la loi, mais de l'appréciation de certains faits et de la portée et des conséquences qu'il est juste de leur donner. Il en est de même des pouvoirs des agents ou des personnes par qui ces actes sont faits, pouvoirs qui sont continuellement mis en question et dont le juge doit aussi décider. La défenderesse plaide que le demandeur a dévié des engagements qu'il avait pris par la police; mais ceci était connu de la défenderesse qui a été informée par le demandeur lui-même, de la marche du navire, de l'époque de son départ, du lieu du naufrage, etc., le tout avec une mise en demeure de lui payer la somme assurée et la déclaration de délaissement. Que fait la défenderesse en présence de cette déclaration si franche et si complète; elle ne répudie pas le délaissement, au contraire, elle prend possession du navire et le répare avec des frais énormes. Elle renonce donc aux objections qu'elle pouvait faire au demandeur, et, en acceptant le délaissement, fait du navire sa propriété. Or la défenderesse ne peut pas agir ainsi et refuser ensuite toute indemnité au demandeur. Le délaissement était justifié, il était parfaitement valable quand il a été fait, et, après son acceptation, les droits des parties se sont trouvés définitivement

fixés. Si la perte, au lieu d'être totale, avait été minime, la défenderesse en aurait profité. La cour maintient donc que la défenderesse, en s'appropriant le navire délaissé par le demandeur, a renoncé à toutes objections qu'elle pouvait faire à ce dernier. Je trouve dans le vol. 18 du "*Jurist*" (Anglais) 1854, p. 394, une décision rendue par Sir Knight Bruce et Sir G.-J. Turner, dans une cause de *Wing* vs *Harvey*, que voici : A avait fait assurer sa vie avec cette condition : *not to leave Europe.* Il transporte sa police à B et vient en Canada où il meurt environ une année après. B paie la prime sur l'assurance de A, pendant l'absence de ce dernier, à un agent des assureurs en Angleterre, et a quelquefois occasion de parler à cet agent de l'absence de A et de sa résidence en Canada. L'agent en question n'était pas au bureau central de l'assurance, mais en était au contraire assez éloigné. Il est évident qu'il y avait eu ici déviation complète des conditions de l'assurance, puisqu'il était stipulé que l'assuré ne devait pas laisser l'Europe. Néanmoins les assureurs ayant reçu la prime pendant l'absence de A, leur agent étant informé de cette absence, il fut jugé qu'ils s'étaient désistés de leur droit, et ils furent condamnés. Ici, Leduc n'est pas tout à fait dans la même position, mais les assureurs lui ont pris sa propriété entière, la chose assurée elle-même. La position de Leduc est donc encore plus favorable que celle du demandeur dans la cause que je viens de citer. Quant à la somme pour laquelle jugement doit être rendu en faveur du demandeur, si Leduc avait établi son droit à la propriété entière du navire, il devrait recouvrer tout le montant réclamé, $5000 ; mais je rejette le témoignage de Vigneau ; je trouve que Leduc n'est propriétaire que de la moitié du navire. Ce navire est évalué par la police à $7000 ; la perte de Leduc qui a assuré seul est donc de $3,500, et cette somme étant moindre que celle assurée $5000, le demandeur doit avoir jugement pour ces $3,500. Défense en droit et exceptions renvoyées, jugement pour le demandeur.

From this judgment both appellants and respondent appealed to the Court of Queen's Bench for the Province of Quebec, which gave judgment in favor of respondent, ordering appellants to pay respondent the whole sum of $5000 and interest and costs. DUVAL, C. J., CARON, J., and DRUMMOND, J., concurred in this judgment ; but BADGLEY, J., dissented therefrom, and MONK, J., dissented only as to part of the sum claimed.

The judgment in appeal is recorded as follows : "Considering that in the judgment pronounced by the Superior Court, sitting at Montreal, on the 31st day of March, 1870, there is error in the amount awarded to plaintiff, Leduc ; considering that the allegations set forth in the declara-

tion fyled by Leduc in the Superior Court are fully established by the evidence adduced in the said court by Leduc, and that, by reason thereof and of the abandonment made by him, after the wreck and total loss of his schooner insured by the Provincial Insurance Company, an abandonment accepted by the company, Leduc is entitled to claim from the company the full amount for which the schooner was insured, to wit $5000; this court doth annul the judgment so pronounced by the Superior Court on the 31st day of March, 1870, doth condemn the Provincial Insurance Company of Canada to pay and satisfy to Leduc the sum of $5000, with interest thereon from the 16th day of November, 1868, with the costs incurred by Leduc as well in the said Superior Court as in this Court." The Honorable Justices BADGLEY and MONK dissenting, the latter Honorable Judge for part only of the sum claimed.

The following were the articles of the Civil Code of Lower Canada, that were referred to: Art. 2521: "Loss for which the insurer is liable is either total or partial." Art. 2522: "Total loss may be either absolute or constructive. It is absolute when the thing insured is wholly destroyed or lost. It is constructive when, by reason of any event insured against, the thing though not wholly destroyed or lost becomes of little or no value to the insured, or the voyage and adventure are lost or rendered not worth pursuing. Before the insured can claim for a constructive total loss he must make an abandonment as declared in the following section." Art. 2538: "The insured may make an abandonment to the insurer of the thing insured in all cases of its constructive loss and may thereupon recover as for a total loss. Without abandonment he is entitled in such cases to recover as for a partial loss only." Art. 2543: "The abandonment is made by a notice given by the insured to the insurer of the loss, and that he abandons to the latter all his interest in the thing insured." Art. 2544: "The notice of abandonment must be explicit and must contain a statement of the grounds of abandonment. These grounds must exist and be sufficient at the time of the notice." Art. 2545: "Abandonment on the ground of the ship being disabled by stranding cannot be made if she can be raised and put in a condition to continue her voyage to the place of destination. In such case the insured has his recourse against the insurer for the expense and loss occasioned by the stranding." Art. 2547: "Abandonment made and accepted is equivalent to transfer, and the thing abandoned with the rights pertaining to it becomes from the time of abandonment the property of the insurer. The acceptance may be either express or implied." Art. 2548: "On an accepted abandonment of the

ship, the freight earned after the loss belongs to the insurer of the ship; that earned previously to the loss belongs to the ship-owner or to the insurer on freight to whom it is abandoned." Art. 2549: "Abandonment made upon sufficient ground and accepted, is binding on both parties. It cannot be defeated by any subsequent event, or revoked otherwise than by mutual consent."

Sir JOHN KARSLAKE, Q. C., and Mr. BOMPAS, for appellants: It is quite clear from the terms of the policy that the ship was precluded from being in the gulf of Saint-Lawrence at the time of the year when she was wrecked. Thus we are not liable for the loss. But then it is said that notice of the abandonment of the ship was sent to us, and that we accepted the abandonment. The notice was not received at the company's chief office, at Toronto, until the 18th of June, 1868, before which time we had sent off MacGregor, with instructions to look after any interest we might have in the cargo and in the ship. When through him we took possession of the ship and repaired it, we were acting merely as salvors. We never accepted the abandonment. We certainly never did so expressly, and it cannot be said that we did enough to accept it constructively. Moreover, it was only by the head office and by some writing that abandonment could be accepted. Even if there were an acceptance of the abandonment, the ship was not insured at the time when she was lost, for the insurance did not extend to a loss in the gulf of Saint-Lawrence after the 15th of November, and an abandonment can be of no avail when there is no insurance. The declaration ought to contain a direct allegation that the risk was covered by the policy; but this of course it could not do, as the risk was not covered. The plaintiff had an insurable interest only to the extent of one-half of the ship. He is accordingly entitled, at the utmost, to one-half only of the insurance money: *Irving* vs *Richardson* (1); *Ebsworth* vs *Alliance Marine Insurance Company* (2).

Mr. ALFRED WILLS, Q. C., and Mr. PAULI, for respondent: There was no breach of the conditions of the policy. It was within the meaning of the policy for the ship to be in the gulf of Saint-Lawrence after the 15th of November, if she were on her voyage from Montreal to Newfoundland before the 1st of December. The clause with reference to being in the gulf means that the ship was not to be in the gulf proceeding westwards after the 15th of November. It did not apply to a ship going eastwards towards New-

(1) 2 B. & Ad., p. 193.

(2) Law Rep. 8 C. P., p. 596.

foundland; the other clause applied to this: see *Colledge* vs *Hardy* (1). Even if there was a breach of the condition, yet the company accepted the notice of abandonment which was sent to them. After notice has been given, the silence of the insurers is sufficient to show an acceptance of the abandonment: *Hudson* vs *Harrison* (2). And if it were not so, though the company did not expressly accept, what they did conclusively shews a constructive acceptance. By their agent they took possession of the ship, they repaired it and retained possession of it until it was arrested at their instance and sold under Admiralty process. They never repudiated the notice of the abandonment, and they never gave any notice of their own object in taking possession of the ship, &c.: *Peele* vs *Mercantile Insurance Company* (3); *Peele* vs *Suffolk Insurance Company* (4); *Cincinnati Insurance Company* vs *Bakewell.* (5) With regard to the argument that in this case the acceptance of the abandonment cannot avail anything, there was certainly an insurance of the ship for the voyage, and what is alleged is that there was a breach of one of the conditions; after an acceptance of the abandonment, the company cannot rely upon a breach of warranty to release them from their liability. The plaintiff is entitled to the whole of the insurance money. He had an interest in one-half of the ship, and the owner of the other half, who was indebted to him, had authorized him to insure the ship in his own name, in order that, if the ship were lost, the plaintiff might receive the whole of the insurance money, and pay himself the amount of the debt.

Their Lordships having reserved their judgment, it was delivered on June 26, 1874, by Sir BARNES PEACOCK: The respondent, Joel Leduc, is the plaintiff, and appellants, the Provincial Insurance Company of Canada, are the defendants in a suit brought in the Superior Court for Lower Canada, district of Montreal, upon a policy of insurance upon the body, tackle, apparel, and other furniture of the schooner *Babineau* and *Gaudry*. The policy was effected by the plaintiff as well in his own name as for and in the name and names of all and every other person and persons to whom the same did, might, or should appertain, in part or in all, for $5000, upon the said ship, &c., beginning the adventures at and from Montreal to

(1) 6 Ex., p. 205.

(2) 3 B. & B., p. 97.

(3) 3 Mason's Reports, p. 27; Phillips, on Insurance, 5th Ed., vol. 2, p. 375.

(4) 7 Pickering's Reports, p. 254 (Phillips, p. 375).

(5) 4 B. Monroe's Reports (Kentucky), 541.

trade between the Island of Newfoundland, Nova Scotia, West India Islands, Cuba, safe ports in the United States, and Quebec and Montreal, to and from ports in the Lower Provinces, the risk commencing at noon of the 15th of December, 1866, and ending at noon of the 15th of December, 1867. The vessel, &c., were valued at $7000, and it was agreed that, in case a total loss should be claimed for or on account of any damage or charge to the said vessel, the only basis of ascertaining the value should be her valuation in the said policy. The vessel was warranted free of war risk. The policy contained a stipulation in the following words. "Not allowed, under this policy, to enter the gulf of Saint-Lawrence before the 25th day of April, nor to be in the said gulf after the 15th day of November, nor to proceed to Newfoundland after the 1st day of December or before the 15th day of March, without payment of additional premium and leave first obtained, war risk and sealing voyages excepted." It may be taken as against plaintiff that the vessel left the port of Montreal on the 16th of November, 1867, for the port of Saint-John, Newfoundland, and that she was wrecked between the 1st and 5th days of December, 1867, about twenty miles below the west point of the Island of Anticosti, in the gulf of Saint-Lawrence. It was contended, on the part of plaintiff, that, notwithstanding the vessel was lost in the gulf of Saint-Lawrence after the 15th of November, 1867, the case did not fall within that part of the warranty or condition by which it was declared that she was not to be in the said gulf after the 15th of November. The argument in support of that contention was, that the words "to proceed to Newfoundland" must, according to the decision of *Colledge* vs *Harty* (1), be read in the sense of "to proceed towards," or "to set sail for," Newfoundland, and that, if read in that sense, it would be inconsistent to allow a vessel to set sail from Montreal to Newfoundland on or before the 1st of December, and not allow her to enter the gulf of Saint-Lawrence after the 15th of November. It was, therefore, urged that the first part of the condition by which it was declared that the vessel was not allowed to enter the gulf of Saint-Lawrence after the 15th of November, applied only to the case of entering the gulf for the purpose of proceeding upwards; and, in support of that argument, the evidence of Bazil de Roy was referred to, in which he stated that it was the custom of navigators to leave the port of Montreal at any time in the month of November, for the purpose of going down the gulf, but that, for the purpose of going up the river,

(1) 6 Ex., 205.

they did not generally enter the gulf later than the 15th of November, and that the reason was that the ice then began to descend, and the navigation became dangerous. Routh, a commission merchant, who was the agent of defendants at Montreal, through whom the policy was effected, stated that he understood by the clause that the vessel was not to be in the gulf after the 15th of November, that is to say, coming west; and going east, not to proceed to Newfoundland after the 1st of December, &c. On cross-examination, he stated he did not undertake to do anything beyond giving his opinion of the reading of the clause. Their Lordships are of opinion that the clause is very clear, that the opinion of Routh is not admissible, and that to put upon the clause such a construction as that contended for, would be to make a new agreement for the parties, instead of construing that which they made for themselves. The only way in which a doubt is created as to the construction of the clause, is by reading the latter part of it, as declaring that the vessel might proceed from any of the ports mentioned in the policy to Newfoundland, on or before the 1st of December, notwithstanding they might have to pass through the gulf after the 15th of November. That, however, is not the true construction of the clause. As their Lordships read it, the vessel was neither to be in the gulf of Saint-Lawrence after the 15th of November, nor to proceed to Newfoundland from any port after the 1st of December. There is nothing inconsistent or unreasonable in giving effect to the words used, and in holding that the vessel, whether proceeding from Montreal, or from any other port, was not to be in the gulf of Saint-Lawrence after the 15th of November. Their Lordships are therefore of opinion that appellants are not liable for the loss unless they have rendered themselves liable by accepting the notice of abandonment. As regards that question, it may be taken as proved that, within a reasonable time after the plaintiff first heard of the loss of the vessel, he gave notice of abandonment to the company's agent at Montreal. In respondent's case, in the appeal to the Court of Queen's Bench, it is said: "The respondent heard of the loss of the vessel on the 19th of May, 1868, and, thereupon, left the notification and protest with the company's agent at Montreal. This document does not appear to have reached the company's head office until the 19th of June following." McCuaig, the agent, however, gave evidence to the effect that the notice of abandonment was, to the best of his knowledge, served upon him on the 19th of May, 1868, and that the said paper was sent by him to the head office of the company, at Toronto, on the same day or the next day. Their Lordships see no reason to doubt the truth of that statement. Crocker,

who was a director and the manager and agent of the company up to the month of August, 1870, when examined as a witness for defendants, declared that the copy of the notice of abandonment was received at the office of the defendants in Toronto on the 18th of June, 1868. On cross-examination, however, he stated that he did not receive a copy of the notice through McCuaig, that he received it from MacGregor, who sent it to him from Quebec. That copy, if sent by MacGregor from Quebec, must havebeen a different copy from that sent by McCuaig. Indeed, one of the learned counsel for defendants was forced to admit upon the argument that the copy notice sent by MacGregor and the notice of which McCuaig spoke must have been different copies. The protest and notice of abandonment gave notice of the time and place of the wreck, demanded payment of the $5000 for which the vessel was insured, and relinquished and abandoned to defendants all the rights, claims, title and interest of plaintiff in the vessel. Both the Superior Court and the Court of Queen's Bench on appeal found that the abandonment was accepted by defendants. Two of the learned judges of the Court of Queen's Bench dissented from the judgment of that court ; Mr Justice Monk, however, dissented only on the question of damages ; Mr Justice Badgley alone dissented as to the acceptance by defendants of the abandonment. It was proved by MacGregor that, on the 24th of May, he was instructed by the manager of the insurance company to proceed to Gaspé, in the gulf of Saint-Lawrence, to look after any interest the company might have in the cargo or in the vessel : he also stated that defendants had constantly acted as salvors and saved vessels, and been allowed salvage for such service. But, whether defendants had acted as salvors on other occasions or not, the instructions which MacGregor received, and upon which he acted, were to look after any interest the company might have in the cargo or in the vessel. He stated that he went to Anticosti and was there on the 15th of June ; that he went to the vessel, which he found about twenty miles from the lighthouse, near the centre of the island, on the south-west side ; that she was lying bottom up with her bow out in the gulf, and her rigging, anchor and chains lying just at her bow ; that a hole had been cut in her side for the purpose of taking out her cargo. He further stated that, after disposing of her cargo, he got material and men, and went back to the island, and took the vessel off, and brought her to Gaspé, where he left her and went home. He said : " After I got to Toronto, I endeavoured to get the salvage," but he was wholly silent as to the person from whom, and the manner in which, he endeavored to get it. He pro-

ceeded: "When I found I could not get it, I went down in September and brought the vessel up to Montreal, where she has since been sold." It was proved that the sale was made after a decree of the Vice-Admiralty Court in a proceeding *in rem* for salvage, and it is stated by Mr Justice Badgley that she was sold under Admiralty process. The case of *Hudson* vs *Harrison* (1) was cited as an authority to shew that the silence of an insurer has been construed to be an acceptance of an abandonment. It is not necessary to go to that length in this case. Their Lordships consider that Mr Justice Story was correct in stating that an insurer is not bound to signify his acceptance of an abandonment. If he says nothing and does nothing, the proper conclusion is that he does not mean to accept. In the case of *Peele* vs *The Merchants' Insurance Company* (2) it was held, by Justice Story, that the floating and repairing of a stranded ship by the underwriters, though it was done with the intention of surrendering to the assured, was a constructive acceptance of an abandonment. In the case of *Peele* vs *The Suffolk Insurance Company* (3) the Supreme Court of Massachusetts held that, though the underwriters had a right to keep possession of a ship for a reasonable time to repair it, yet, that their keeping of it for an unreasonable time for that purpose was a constructive acceptance of the abandonment. It has also been held that, if the underwriters take possession of a vessel after an abandonment and proceed to repair without giving notice of their object, it is an acceptance: *The Cincinnati Insurance Company* vs *Bakewell* (4). In the present case; defendants were not merely silent, but they were active and, by their agent, MacGregor, took possession of the vessel after notice of abandonment had been sent to the head office at Toronto; and the vessel was kept in the possession of defendants from the time it was raised and taken into Gaspé until it was arrested at the instance of defendants by the Vice-Admiralty Court, and it must have been repaired before it was taken to Montreal. MacGregor stated, in his evidence, that he left the vessel at Gaspé when he returned to Toronto; but there can be no doubt that it was left in the charge of some person on behalf of the company from that time until the month of September following, when he returned to Gaspé and took the vessel up to Montreal; and, at all events, the vessel

(1) 3 B. and B., p. 97.

(2) 3 Mason's Reports, p. 27; Phillips on Insurance, vol. 2, 5th ed., p. 375.

(3) 7 Pickering's (Mass.) Reports, p. 254; Phillips, on Insurance, vol. 2, 5th ed., p. 375.

(4) 4 B Monroe's Report (Kentucky), p. 541.

having been raised and taken into Gaspé by the agent of defendants, must be assumed to have remained in their possession until proved to have been delivered over. There is no evidence that plaintiff, at any time during that period, had notice of the object with which defendants took and retained possession of the vessel, or that they disputed their liability for the loss upon the ground of a breach of warranty, or that they repudiated the notice of abandonment. There was nothing to lead plaintiff to suppose that defendants repudiated altogether their liability under the policy and the notice of abandonment, and that they were acting, not as insurers, but as mere ordinary salvors, who had no interest whatever in the vessel, and their Lordships cannot believe that they acted merely in that capacity. The remarks of the court in the case above cited of *The Cincinnati Insurance Company* v. *Bakwell* (1) are very applicable to the present as regards that suggestion. Mr. Justice BADGLEY considered that the decree of the Vice-Admiralty Court in favour of defendants proved them to be mere salvors of the vessel. But their Lordships do not concur in that view. That decree is dated the 23rd of april, 1869. It does not appear, nor is it very material, at what time the suit in the Vice-Admiralty Court was commenced. It is, however, stated by Mr. Justice BADGLEY, and the fact is probably so, that the vessel was libelled pending the present action in the Superior Court. It was, however a proceeding *in rem*, and not against plaintiff personally. It would have been no answer in that proceeding for plaintiff to have alleged that he had no interest in the vessel, that, by virtue of the insurance, the loss, the abandonment and the acceptance thereof, the vessel had become the property of defendants. If the defendants thought fit to libel their own vessel for salvage, it was no concern of plaintiff's, nor was he bound to appear. He could not have defended that suit without alleging that he had an interest in the vessel, and thereby prejudicing his own action on the policy and his contention that defendants had accepted the abandonment. Crocker stated that MacGregor was never instructed to accept an abandonment, and that abondonments could be accepted only at the head office and by writing; but MacGregor was instructed to look after the interests of the company, and, if his acts in pursuance of those instructions, coupled with the non-repudiation of the notice of abandonment, amounted to an acceptance, or were evidence from which an acceptance might be inferred, defendants are bound by those acts. The question as to whether the abandonment has been construc-

(1) 4 B. Monroe's Reports (Kentucky), p. 541.

tively accepted is a mixed question of law and fact. Unfortunately, we have not the reasons of the majority of the judges. Their Lordships are of opinion that the acts of defendants, by their agent, MacGregor, in regard to the vessel after notice of abandonment, and especially their repairing the vessel and retaining it in their possession from the time when it was raised up to the time of their libelling it in the Vice-Admiralty Court, without repudiating that notice or informing plaintiff as to the character in which they were acting, were evidence of an acceptance of the abandonment. They would not reverse the concurrent decisions of two courts upon a question of fact, except upon the clearest conviction that they were wrong. In the present case, they are of opinion that the courts were correct in finding that the abandonment was accepted. Their Lordships' view upon this part of the case would be the same, even if McCuaig had not forwarded the notice of abandonment to the head office before the 18th of june. Then, as to the effect of that acceptance, it was contended that, as there was no loss for which defendants were liable, the notice of abandonment was inoperative, and that the acceptance of it could not convert a partial loss for which defendants were not liable into a total loss for which they were liable. Articles 2521 and 2522 of the Civil Code were referred to, and it was urged that there could be no loss within the meaning of the Code, unless it was caused by an event insured against. Mr. Justice BADGLEY was of that opinion, and he considered that, at most, there was only a partial loss, which could not, under articles 2544 and 2545, be converted into a total loss by notice of abandonment. That learned judge said: "Implications of acceptance are not favoured, and can have no effect or validity in contravention of the positive fact upheld by article 2545 of the actual recovery of the stranded vessel." He was also of opinion that the fact of the restoration and recovery of the stranded vessel prevented abandonment at all. It appears to their Lordships that the learned judge did not sufficiently advert to the distinction between a mere notice of abandonment and a valid abandonment, or a notice of abandonment which has been accepted. Their Lordships are of opinion that the present case did not fall within article 2545 upon which Mr Justice BADGLEY so much relied. It was not a case of mere stranding. The vessel could not have been raised and put into a condition to continue her voyage to the place of destination. Further, it appears to their Lordships that article 2545 must be read in conjunction with articles 2538, 2543 and 2544, and that it does not apply to the case of an abandonment which has been accepted. It puts the case of stranding very much

upon the same footing as that upon which it stands under the law of this country. Abandonments made and accepted are treated of in article 2547. It is there said: "Abandonment made and accepted is equivalent to transfer, and thing abandoned, with the rights pertaining to it, becomes from the time of abandonment the property of the insurer. The acceptance may be either express or implied." Article 2549 of the Code was intended to prevent a notice of abandonment when accepted from being defeated by any subsequent event. The Superior Court held that defendants were estopped, by the acceptance, from urging against plaintiff objections founded upon the breaches of condition, and awarded plaintiff half the amount, viz. $3500, of the declared value of the vessel. The Court of Queen's Bench (Mr Justice BADGLEY dissenting), held that the allegations set forth by plaintiff in his declaration included an allegation of acceptance, were fully proved, and that, by reason thereof and of the abandonment accepted by the company, plaintiff was entitled to recover the full amount insured, viz. $5000. Mr Justice MONK dissented on the question of amount only. He considered that plaintiff was entitled to recover but only one half of the amount insured. Their Lordships are of opinion that, by the acceptance of the abandonment, the defendant became liable as for a total loss. In *Smith* vs *Robertson* (1) it was held that the insurers could not be allowed to say that the loss was not total, after they had acquiesced in the abandonment as for a total loss, and had thereby admitted that the loss was a loss of that description. In that case, the insurer had no right to abandon, but merely a right to give notice of abandonment. But the moment the notice was accepted, the abandonment took effect: the loss immediately became tantamount to a total loss; and the insurers were percluded from relying upon the subsequent recovery of the property, because they were not allowed to say that the loss was not total. This case, as it appears to their Lordships, gets rid of the objection of Mr Justice BADGLEY to the form of plaintiff's declaration. He says: "Now, the only loss alleged in the declaration is that '*ledit navire aurait péri corps et biens dans le golfe Saint-Laurent, faisant un naufrage entier et complet,*' which is the absolute total loss of the Code article, where the thing insured is wholly destroyed and lost, in other words, submerged in the gulf of St-Lawrence. As matter of fact, the alleged total loss is not true and has been disproved, but it is the only one alleged, and the insurers cannot be made to suffer from any other description of loss or cause of action than that charged: and, in strict justice, appellant's action should be dismissed, unless, under the rule of

(1) 2 Dow., p. 474.

practice, he should elect to amend his declaration to meet the proof of the case, which, as it is, admits of no effective abandonment with its alleged acceptance as set out in the declaration." Their Lordships would deeply regret if an objection to the mere form of the declaration, which does not affect the merits of the case, should compel them to decide against plaintiff, but they are relieved from that difficulty by the above-mentioned case in the House of Lords, in which it was held that the insurers, after acceptance, could not be allowed to say that the loss was not total. It was contended that the vessel was not insured at the time when she was lost, as the insurance did not extend to a loss in the gulf of St. Lawrence after the 15th of November, and that an abandonment can be of no avail when there is no insurance. But the vessel was in fact insured; the loss occurred during the time and upon a voyage described in the policy, but there was a breach of one of the warranties or conditions expressed. In the case of the *Cincinnati Insurance Company* vs *Bakewell* (2), the insurance was merely against a total loss. But it was held that the insurers could not, after acceptance of an abandonment, rely upon the fact that the loss was not total, and, consequently, that it was a loss within the terms of the policy. There is no distinction in principle between an express and a constructive acceptance of an abandonment. The effect produced upon the rights of the parties is the same in both cases. Suppose defendants, upon the receipt of the notice, had written to plaintiff, and said that, as the loss took place in the gulf of St-Lawrence after the 15th of November, they did not consider themselves in strictness liable to make good the loss; that they found upon inquiry, that Routh, their agent at Montreal, through whom the insurance was effected, was under the impression that that part of the warranty which declared that the vessel was not to be in the gulf of St-Lawrence after the 15th of November applied merely to the case of its going west, and that, under those circumstances, they did not consider it right to avail themselves of the breach of warranty; that they accepted the abandonment and would make the best they could for themselves of the salvage, and would settle as for a total loss. Or, suppose they had gone further, and stated that they concurred with Routh in his construction of the policy, and that they accepted the abandonment. Suppose that, after they had raised the vessel, they had sold her for $10,000 in excess of the salvage expenses, it is clear that plaintiff could not have turned round and claimed the full amount of the proceeds of the vessel upon the ground that the loss was not caused by a risk insured against, and that he had,

(2) 4 B. Monroe's Reports (Kentucky), p. 541.

consequently, no right to give notice of the abandonment. If plaintiff could not have treated the abandonment as a nullity, surely defendants cannot be allowed, after acceptance, to rely upon a breach of the warranty or condition of which they had full notice at the time of their acceptance of the abandonment. Estoppels are mutual. If the mouth of one party is closed, so also is that of the other. By the abandonment and the acceptance of the abandonment, the matter was closed. The whole interest of plaintiff in the thing abandoned was transfered to defendants, and became their property (Article 2547). There are many cases in which it may be very doubtful whether, in point of law, the particular facts amount to a breach of warranty. But if, after a constructive total loss and notice of abandonment, the insurer, with full knowledge of all the facts, accepts the notice of abandonment, he cannot, when called upon to pay the amount insured, resile and rely upon a breach of warranty. The effect of acceptance is, as remarked by Arnould, well expressed by Boulay Paty (1) — "*Par leur acceptation volontaire il s'est fait un pacte entre les parties qui a tout terminé*" (2). The only remaining question is as to the amount to which plaintiff is entitled. Jean-Baptiste Vigneau proved that his brother, Benjamin Vigneau, who was the captain of the vessel and was lost in her, told him that he was in debt to plaintiff, that he had given him a guarantee for the debt, and had authorized him to insure the vessel *Babineau and Gaudry* in his own name, to the end that if the vessel should be lost, plaintiff might receive the whole of the insurance money and pay himself the amount which Benjamin Vigneau owed him. Their Lordships consider that the declaration of the deceased against his own interest was evidence sufficient to prove that the plaintiff was authorized by Benjamin Vigneau to insure the half of the vessel which belonged to him, and to receive the amount insured. This, coupled with the interest which the plaintiff had in the other half of the vessel, entitled him to insure the whole vessel, and to recover the full amount insured. Mr Justice BADGLEY appears to have overlooked the evidence of Jean-Baptiste Vigneau, when he stated that his interest in the insurance money did not exceed one-half share thereof. It is clear that an agent who insures for another with his authority may sue in his own name (3). The mortgage did not affect the plaintiff's right to insure for the full amount of the value of the vessel. The vessel, of the value of it, may be the only means which he has of paying

(1) Cours de Droit Comm. tit. 11, sec. 4, vol. 4, p. 380.

(2) Arnould, on Marine Insurance, 4th ed., p. 859, note.

(3) Phillips on Insurance.

the mortgage debt. Their Lordships are of opinion that the judgment of the Court of Queen's Bench was correct, and they will humbly advise Her Majesty to affirm it, with costs of this appeal. (14 *J.*, p. 273 ; 19 *J.*, p. 281 ; 5 *R. L.*, p. 579, et 6 *Law Rep., P. C.*, p. 224)

Solicitors for the appellants, MM. BISCHOFF, BOMPAS and BISCHOFF.

Solicitors for the respondent, Mr W. H. ASHURST.

EVIDENCE.—LANDLORD PRIVILEGE.

CIRCUIT COURT, Montreal, 15th December, 1869.

Coram TORRANCE, J.

ARCHIBALD *et al. vs* SHAW, *and* MCDONALD *et vir*, intervening parties.

Held: 1. That the sale of a safe, by a hotel-keeper to a trader, to whom the former was indebted for groceries furnished, is a commercial matter under C. S. L. C., cap. 82, sec. 18, and can be proved by witnesses.

2. That a landlord's *gage* on the effects in the premises leased will not prevent the sale of the effects to a third party, even when rent is due, unless the landlord seizes and prosecutes the seizure to judgment.

PER CURIAM : This case is before the Court on the merits of a *saisie revendication* and an intervention. The defendant has not pleaded. On the 7th December, 1868, the intervening party, Mary McDonald, granted a lease to Henry Lampen, boarding house-keeper, of the premises known as the Victoria house, for a rent of $2400 per annum. During the existence of the lease, about the 29th January, 1869, Lampen sold and delivered to plaintiffs, in payment of a bill for groceries, a safe which was in the leased premises. On the 2nd February, 1869, Mary McDonald sued out a writ of *saisie-gagerie par droit de suite* against Lampen, for $600 rent accrued on the 1st February. This *saisie-gagerie* was not returned into court, owing to a settlement alleged to have been made between Mary McDonald and Lampen. But, under the *saisie*, the safe was taken out of the possession of plaintiffs and finally placed by Mary McDonald in the hands of defendant. The plaintiffs, on the 21st May, 1869, attached the safe as their property, in the hands of defendant. Mary McDonald has intervened in this suit, setting up the lease, the indebteness of Lampen for rent, for over $400, her lien on the safe, as one of the *meubles meublans* of the premises, and a settlement between herself and Lampen, after the *saisie-gagerie*, by which settlement, she was allowed to keep the safe in part payment of her rent; that the safe, and other things in the premises, were not suf-

ficient to pay said rent, and, in order to prevent costs of following up the suit *sur saisie-gagerie*, Lampen handed over said safe, to the female petitioner to be disposed of, at auction or otherwise, for the payment of said rent, according to its sufficiency; "that, thereupon, she placed it in the store of defendant, as an auctioneer, to be stored there, for her, until defendant could and would sell it at auction for said purpose, and the same still remains there, *gagé* as aforesaid for said rent, and she hath right to hold the same until said rent is paid by sale of said safe or otherwise." The conclusion of the petition in intervention was to the effect that she might be allowed to intervene, and take up the *fait et cause* for defendant, to plead to plaintiff's action as she might be advised and protect her rights. She then pleaded to the action, setting up, in effect, the matters alleged in the intervention, adding further that the safe was her property, and that she had a right to hold the same until payment of the rent. The prayer of this plea was that the *saisie revendication* might be set aside, and the action dismissed. The plaintiffs have fyled an answer in law to the plea of the intervening party, and the chief reasons alleged in support of it are that the plea does not show any right of proprietorship in the safe in Mary McDonald, and that the pretended transfer, by Lampen to her, was without the consent of plaintiffs who were, before the *saisie*, in admitted possession of the safe as proprietors. The plaintiffs further pleaded the sale to them of the safe by Lampen, the seizure by the *saisie-gagerie*, and that the *saisie-gagerie* was never returned into court or adjudicated upon, but was discontinued by an agreement between Lampen and Mary McDonald; "that plaintiffs cannot now in any manner or form be held affected or be deprived of their right in the safe, whether the remaining effects were more than sufficient to secure the payment of any rent accrued, accruing or to accrue to the *intervenants*, and that no transfer or attempted transfer of the safe was included in any agreement or ever made to *intervenants*; that, even, if any privilege of *gage* had existed upon the safe in favour of *intervenants*, the same was lost and abandoned by reason of the discontinuance of the action of *saisie-gagerie*." The court, after a careful examination of the evidence, is of opinion that the identity of the safe, and possession by plaintiffs, under a sale from Lampen to them, about the 29th January, is proved by Lampen, and that proof is allowed by C. S. L. C., cap. 82, sec. 18. Mary McDonald, on her part, has proved the indebtedness of Lampen for rent, on the 1st February, for $600; that the safe was in the premises leased as *gage* for the rent, and that the other furniture was insufficient security, but she has not proved the settlement

with Lampen. In fact, the process of *saisie-gagerie*, under which the safe was taken out of the possession of plaintiffs, was abandoned. The court sees a *bona fide* sale and delivery to plaintiffs, about the 29th January, which vested the property in them, subject to the *gage* of the landlord, if the privilege was exercised within 8 days after removal from the leased premises. Under these circumstances, has Mary McDonald an absolute right to hold the safe against plaintiffs, and pray for the dismissal of their action? The court is against the pretension of the intervening parties.

The judgment is as follows: "The court, having heard plaintiffs and the intervening parties on the merits of the contestation raised by the intervening parties to the action and *saisie revendication* of plaintiffs, having heard the parties, also, on the motion of the intervening parties, that the evidence of the witness, Henry Lampen, so far as it attempts to prove, by verbal testimony, a sale of the safe from Lampen to plaintiffs, as being not a commercial matter, and also the payment of the rent due by Henry Lampy to the intervening party, Mary McDonald, as being a larger sum than $50, be rejected from the record; considering that, by C. S. L. C., cap. 82, sec. 18, the sale of the safe by Lampen to plaintiffs could be proved by verbal testimony; considering also that the payment of rent under the lease between Lampen and Mary McDonald could not be proved by verbal testimony; doth dismiss so much of said motion as has reference to the proof of said sale, and doth grant that part of the motion which has reference to the proof of payment of rent; considering, further, that plaintiffs, on or about the 29th January, 1869, bought and obtained delivery, without fraud on their part, of the said safe from Henry Lampen subject to the privilege of Mary McDonald as lessor, if that privilege were exercised by *saisie-gagerie par droit de suite*, or otherwise, within eight days next after the said safe was removed from the leased premises; considering that the writ of *saisie-gagerie*, sued out by Mary McDonald, on the 5th February, 1869, under which she took possession of the safe, was never returned into court or adjudicated upon, and there is no proof that plaintiffs have been lawfully dispossessed of said safe; considering that Mary McDonald hath failed to establish that she is entitled to the conclusions of her intervention, or pleas to plaintiff's action, doth dismiss the intervention and plea, with costs (1)." (14 *J.*, p. 277)

C.-P. DAVIDSON, for the plaintiffs.

DOHERTY and DOHERTY, for the *intervenants*.

(1) This judgment was confirmed in Review, 28th June, 1870, BERTHELOT, J., MACKAY, J., and BEAUDRY, J.

COMMISSION ROGATOIRE.

SUPERIOR COURT, Montreal, 22nd May, 1869.

Coram TORRANCE, J.

HARVEY *vs* PHILLIPS.

Held: That an application by a defendant for a *commission rogatoire* must be made within the delay specified in art. 308 of the Code of Civil Procedure, and will not be granted afterwards, except on special cause shown and in the discretion of the judge. The absence of the party on a trip abroad is not a valid reason for not applying in time for a commission.

This was a motion to revise the ruling at *enquête* of Mr. Justice MONDELET. The case had been duly inscribed for *enquête* for the 6th April, 1869, when plaintiff closed his *enquête*. On the 4th of May, 1869, defendant applied, by motion, for a *commission rogatoire* to examine certain witnesses at Hamilton, in the Province of Ontario. The application was supported by affidavits, establishing that the commission was necessary, and that defendant's absence in England was the cause of the application not having been made within the proper delay.

MONDELET, J., rejected the motion as coming too late.

TORRANCE, J.: The application ought to have been made within 4 days after plaintiff's *enquête* was closed, and, although special cause has been shown by affidavit, the court has to exercise a discretion in the matter, and must reject the application as coming too late. The motion to revise Judge MONDELET's ruling is consequently dismissed. (14 *J.*, p. 279)

CARTER and HATTON, for Plaintiff.

J.-J.-C. ABBOTT, Q. C., for defendant.

PROCEDURE.—CONTESTATION LIEE.

COUR SUPÉRIEURE, EN REVISION, Montréal, 31 mai 1870.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

HUTCHINS *et al. vs* FRASER *et al.*

Jugé: Que la contestation est liée par une réponse générale à une exception, et qu'aucune réplique n'est recevable. (1)

Les demandeurs réclamaient, par leur action intentée devant la Cour de Circuit pour le district de Saint-François, à Sher-

(1) Art. 148 C. P. C.

brooke, la somme de $103.75. Le défendeur plaida une exception de paiement. Les demandeurs produisirent une réponse générale, et, en même temps, leur articulation de faits. Le lendemain, le défendeur fit signifier un avis de motion aux demandeurs, pour faire rejeter l'articulation de faits comme étant produite trop tôt et irrégulièrement, les défendeurs prétendant qu'ils avaient le droit de produire une réplique à la réponse générale. Le 10 décembre 1869, la Cour de Circuit, à Sherbrooke, SHORT, J., a renvoyé la motion, avec dépens. Les demandeurs ont porté ce jugement devant la Cour de Revision, à Montréal.

PER CURIAM: Il s'agit de savoir s'il y avait besoin d'une replique à une réponse générale faite à une exception de paiement, de manière à empêcher l'articulation de faits avant la production de cette replique. L'art. 148 C. P. C. déclare que la contestation est liée sans cette replique. Jugement confirmé. (1) (14 *J.*, p. 280)

L.-H. DAVIDSON, avocat des demandeurs.

IVES and HOVEY, avocats des défendeurs.

TESTAMENT.—LEGS.

COURT OF QUEEN'S BENCH, Montreal, 7th September, 1870.

Coram DUVAL, C. J., CARON, J., DRUMMOND, J., BADGLEY, J., and LORANGER, J. *ad hoc.*

ROBERT HERVEY, *ès-qualité*, defendant in the court below, appellant, *and* WILLIAM HERVEY, plaintiff in the court below, respondent.

Held: Where a bequest was made in the following words: "I hereby will, devise and bequeath "£125 to my ward, William Hervey, to be appropriated to the finishing of his education," and the education of the legatee was completed at the testator's expense before the death of the latter, that the accomplishment of the object for which the legacy was given before the testator's death did not relieve the executor from paying the legacy.

This appeal was from a judgment of the Court of Review, at Montreal, confirming a judgment of the Superior Court there, whereby defendant, appellant, was condemned to pay £125, as the amount of a legacy bequeathed to plaintiff,

(1) La contestation est liée par la demande, les exceptions et les réponses aux exceptions, quand ces réponses sont générales et ne contiennent aucun fait non articulé dans la demande. Art. 148 C. P. C. (*Cochrane et al.* vs *Bourne et al.*, C. S , Montréal, 27 avril 1869, TORRANCE, J., 13 J., p. 168, et 19 R. J. R. Q., p. 232)

respondent, in the last will and testament of James Hervey, in the following words: "I hereby will, devise and bequeath, one hundred and twenty-five pounds to my ward, William Hervey, youngest son of my cousin, the late James Hervey, to be appropriated to the finishing of his education." The appellant was sued in the court below, as well in his capacity of sole executor of the last will and testament of James Hervey, as in his capacity of legatee, in his own right, for one half of the succession of the testator, and of fiduciary legatee of the residue of the other half, with remainder to appellant's children. He pleaded: 1st that, in and by the said will bequeathing $500 to plaintiff, it was specially mentioned and declared that the said sum was intended for the finishing of the education of plaintiff; that the will was made in 1857, when plaintiff was about 14 years, and that the testator died in April, 1864, when plaintiff was about 21 years; that, at the time of the testator's death, the education of plaintiff had been entirely finished, and at the expense of the testator, and that the object of the legacy had been entirely accomplished; and that, in consequence, plaintiff was not entitled to demand the same from defendant; 2nd plea: that plaintiff was indebted to testator in a much larger sum than the amount of legacy, and that the same was compensated thereby. The respondent answered that it was not a condition of the legacy that it should only be valid and be paid in event of his education not being completed at the time of the testator's death; that, on the contrary, it was given absolutely and without condition; and that the words "to be appropriated to the finishing of his education" merely expressed the wish of the testator as to the mode in which the money bequeathed should be appropriated by the legatee; that the education of respondent was finished long before the testator's death, and that, if he had desired that the legacy should not take effect, he would have revoked it; and that, in fact, since the testator's death, appellant had repeatedly admitted the legacy to be due and made propositions for its payment. And that with regard to the alleged indebtedness, it had never existed. The result of the testimony adduced may be summed up as follows: The testator was an old bachelor, residing at Brockville; respondent and his brother and sister lived with their mother, the widow of a cousin of the testator, at Chicago; and, at the request of the testator, came to Brockville, to live with him, as members of his family, residing with him in that character from 1851 to the time of his death in the year 1864. During this period, they were treated by the testator in every respect as if they were his children. He provided them with everything they wanted, sent them to school, and acted towards them in every way as

a parent would do. Being a business man, and, as the witnesses stated, very particular in ascertaining what became of his money, memoranda or entries were made in his books of account from day to day of all his expenditure in the clothing, maintenance and education of these children; and it was the entries so made which were relied upon by appellant as indicating an indebtedness by respondent to him. After the death of the testator, appellant became the sole acting executor of the estate, he being, at the same time, the absolute owner of one half of it as a bequest, and the owner of the residue of the other half, subject to a reversionary interest in it in favor of his children. Being possessed of the estate in these capacities he was applied to by the children, in favor of each of whom a bequest was made by the will similar to that in favor of respondent, for payment of their respective legacies. The appellant first made a proposition to them for payment, which was not accepted; and after further delay, action was brought to recover the amount.

Judgment was rendered by Mr. Justice MONK, 9th July, 1868, in favor of plaintiff, as follows: "Considering that plaintiff hath established the material allegations of his declaration, and that defendant hath failed to prove the matters and things alleged in his pleas, and that plaintiff ought not by reason of such matters and things to be barred and prevented from obtaining the conclusions of his declaration; doth dismiss said pleas and doth condemn defendant, in his said capacities, to pay and satisfy to plaintiff the sum of $500, amount of the legacy bequeathed to plaintiff, by James Hervey, in and by his last will and testament made and signed in the form of an olograph will, and bearing date the 7th day of March, 1857, with interest from the eleventh of October, 1867, date of the service of process in this cause, until actual payment, and costs of suits."

This judgment was confirmed in review, 31st March, 1869, TORRANCE, J., and BEAUDRY, A. J., MONDELET, J., dissenting.

MONDELET, J., dissented in review on the ground that the legacy was for a particular object, and the object having been accomplished, the legacy lapsed.

TORRANCE, J., for the majority of the court, held that the accomplishment of the object for which the legacy was given, before the death of the testator, did not relieve the executor from the responsibility of paying the legacy. In support of this opinion the learned judge cited "Redfield, on Wills": That courts of equity would not compel the legacy to be applied to the special purpose in the will mentioned. In *Barton* vs *Cooke*, it was decided that, if a legacy were bequeathed to an infant, to be used for a particular purpose, and it could

not be so applied, it would nevertheless be due, to be applied in some other manner. As to the plea of compensation, it was not available. The late James Hervey, as appeared from his accounts, was a very careful man and marked every item of his expenditure with exact precision, but, although he kept an account of the advances made to plaintiff, there was no proof, or even probability, that he intended to charge them against him.

HENRY STUART, Q. C., for appellant: The allegation of the first plea, that the object of the legacy had been accomplished, was established by the admission of plaintiff that his education was completed at the time of the testator's death, which occurred in 1864. The bequest was made in 1857, when the plaintiff was at school, and intended, as the will clearly expresses, to finish the education; the object of the testator being clearly that plaintiff, in the event of his death, should continue his education, and he thereby provided means for that purpose; a very limited amount for children of tender age, shewing that the testator did not contemplate liberality, but merely to secure these distant relatives an opportunity of supporting themselves when their education should be finished. The education having been finished at the expense of the testator, before his death, the intention of the legacy having been attained at the testator's cost, the legacy lapsed by the accomplishment of the object for which it was made. As to the second plea, it is abundantly proved that the debt is due by the plaintiff; in fact, the plaintiff admits under examination that the entries are correct. The attempt to construe the legacy into an intentional gift, or release of the debt, by the allegation that the repayment of the advances was never intended to be enforced, cannot be maintained. The waiver of the right to demand the payment of monies furnished is not to be inferred from the fact of the legacy. The debt has been clearly proved, and it is, of course, impossible to presume a gift, or release, or a waiver of any right. The law on this point admits of no doubt: "Where a creditor bequeaths a legacy to his debtor, "and either does not notice the debt, or mentions it in such a "manner as to leave his intention doubtful, and after his "death the securities for debt, if any exist, are found uncan-"celled among the testator's property, the Courts of Equity "do not consider the legacy to the debtor as necessarily, or "even *prima facie*, a release or extinguishment of the debt" (2 *Williams, on Executors*, part 3, lib. 3, ch. 2, sec. 9, p. 1309, 8th ed.). The appellant submits that, under these circumstances, the plea of compensation ought to have been maintained, and the legacy declared set off and extinguished by the debt owing to him. The defendant would again refer

to *Williams, on Executors*, p. 1310, where the law on this point is distinctly stated : " Where a legatee is indebted to the " testator, the executor may retain the legacy, either in part " or full satisfaction of the debt, by way of set off. And it has " been held that, in a suit by a legatee to obtain payment of " the legacy out of the assets of the testator, in a due course " of administration, the executor may retain so much of the " legacy as is sufficient to satisfy a debt due from the legatee " to the testator, although the remedy for such debt was, at " the time of the death of the testator, barred by the Statute " of Limitations."

J.-J.-C. ABBOTT, Q. C., for respondent : As regards the pretension that the legacy was compensated, respondent insists that no indebtedness towards appellant was created by the fact that the testator maintained and educated the children while residing with him ; no intention of being repaid these sums, or of demanding or exacting repayment, appearing ever to have existed in the mind of the testator. In fact, it would appear from the evidence that he stood of his own free will towards the children *in loco parentis ;* and had no more idea of charging them with the expenses of their bringing up than a parent would have had. The evidence on this point is very explicit and decided. J.-M. Lawder, who was apparently an intimate friend of the testator, and who was in his employ and had charge of his books, and was aware of the nature of the relation between the widow and her children and the testator, states that the testator always expressed his affection for respondent and his brother and sister, declaring that he cared for them as much as if they were his own children ; that he would bring them up as his own children ; and that, as long as he had a house, he would share it with them. And he explains the reason why the items expended upon the children were entered at all, namely, that the testator was a very particular man in business ; kept a very exact account of everything spent ; and insisted upon having every half-penny that was paid out properly entered. But he declares that so far as he could ascertain the intentions of the testator, he never entertained the idea of his nephews being called upon to refund the amount expended in their bringing up. Jane Lawder, another niece who lived with him a considerable number of years, and between whom and himself great confidence existed, gives the same evidence and speaks of conversations with him, in which he declared that he looked upon them as his own children, and spoke of them as having them with him as members of his family. She also had received benefits from the testator in the way of sums spent for her maintenance and education ; and these sums were entered as were those

spent for respondent; but no attempt in her case was made to set off these expenses against her legacy, nor, as she declares, could there have been any such intention in the case of her cousins, one of whom is respondent. This evidence is confirmed by the witnesses for appellant, James Hervey, and Jonathan Findlay. The respondent, therefore, contends that no presumption of indebtedness arises from these circumstances, but that, on the contrary, the testimony and the presumptions arising from it are alike in favor of the intention of the testator to bestow gratuitously upon the destitute family of his relative the care of their persons and their education. With regard to the pretension of appellant that the legacy was given for the sole purpose of educating respondent, he contends that, in fact, the will does not assign that as a condition of the legacy, but states it in the form of a direction or wish as to its application. The bequest is not to an executor or trustee for the purpose of being expended in a particular way; it is made direct to the legatee, not with any condition, but followed by a simple request or direction that the legatee, should appropriate it in a particular manner. The devise therefore is absolute and, as respondent submits, cannot be controlled by any reason assigned for it, or by the expression of any wish of the testator as to the mode in which the legatee might choose to spend it. The statement in the concluding part of the bequest that it is to be appropriated to finishing the education of the legatee is not, in the language of the French writers, *la cause finale et déterminante* of the legacy; it is merely *la cause impulsive*, and it is universally laid down that there is a broad distinction between the effect given to these two causes; for one may serve to annul a bequest, the other never can. Moreover, it is well said by a late writer on this subject: "*Si le testateur n'a point usé de la faculté de révoquer, il est censé avoir persévéré dans la même volonté jusqu'à sa mort.*" And a commentator on Zachariæ puts this pertinent question: "*Qui sait, en effet, si, même en l'absence de la cause exprimée, le donateur n'aurait pas fait la donation?* The respondent contends that, in this instance, though the testator may have had for an object to assist respondent in completing his education, there is nothing to shew that he intended his bequest to lapse in the event of respondent's education being completed, or that he intended it to be diminished *pro tanto*, if his education could be finished for a less sum of money than the amount of the legacy. As to the pretension of compensation, respondent urges that there is no evidence of the existence of any debt by which the legacy could be compensated. And he refers to the offers of settlement by appellant, to shew that he had admitted the

position of respondent long previous to the bringing of the action. And, being himself the proprietor of the estate to be affected by those admissions, they are binding upon him.

BADGLEY, J.: James Hervey, by his will, bequeathed a money legacy to plaintiff, stated in the will to be for his education. The legatee was educated by the testator, who died long after the legatee had completed his education, and had even been taken into the service of his relative. The legacy, as matter of course, only became open at the testator's death, long after the intent of it had gone by. The testator before his death had not changed his will as to the legacy, but it seems that, being a man of business, he regularly charged in his account books whatever he paid out either for himself or for any of his family, and, among others, he charged to the legatee from his early childhood what he had expended in bringing him up, his clothing and education. The residuary legatee has set this off against the legacy, but it is distinctly proved that, in entering these expenses in his books, the testator never intended to make the children repay him and frequently declared so. The judgment appealed from is correct and the appeal must be dismissed.

DUVAL, C. J., concurred. The pretension of the executor, appellant, was untenable, and respondent was undoubtedly entitled to receive the legacy.

Judgment confirmed unanimously. (14 *J.*, p. 290)

HENRY STUART, Q. C., for the appellant.

J.-J.-C. ABBOTT, Q. C., for the respondent.

POWERS OF MUNICIPAL CORPORATIONS.

SUPERIOR COURT, Montreal, 30th September 1870.

Coram TORRANCE, J.

FOURNIER DIT PRÉFONTAINE *vs* LA CORPORATION DU COMTÉ DE CHAMBLY.

Held:—That, where a by-law of a municipal council of a county appointed a committee to acquire land, and contract for the construction thereon of a "court-house, registry office and fire-proof vault," such committee exceeded its powers in contracting for the construction of a "*public hall*, court-house, registry office, and fire-proof vault," even though the cost stipulated in the by-law was not exceeded; and no action will lie against the corporation on such contract, the corporation having notified the contractor that they would not hold themselves responsible for any work done under the contract.

TORRANCE, J.: This is an action of damages by a contractor against the corporation of the county of Chambly. The

declaration of plaintiff sets forth that, at a quarterly meeting of the council of the corporation, held on the 12th September, 1866, a by-law was passed for the purchase of land and the construction of a registry office and court-house, and for the construction and keeping of a fire-proof vault for the preservation of the archives of the registry office and court; that a committee of three was named by the council to acquire land at Longueuil for the construction of a building for a registry office and court-house, "à telles considérations, charges, clauses et conditions," that the committee, or a majority, should think proper; that the committee, or a majority, was, by the by-law, authorized to cause to be constructed for the council, and at its cost, on the land it should acquire, a suitable building, either in brick or stone, with a fire-proof vault, &c.; that this committee was composed of D.-Gédéon Larocque, Jean-Baptiste Jodoin and Toussaint Bétournay, all members of the council, provided, nevertheless, that the committee should not bind the council for more than $2000; that this committee and plaintiff, on the 11th December, 1866, made an agreement for the construction of the building, and the price was to be $4350, if defendants drew money from the government, and $2000 in the other case; but, in any case, defendants were not to pay more than $2000, for the fabrique of Longueuil gave defendants the land required, with an old stone house giving sufficient materials for the new building, and promised to pay defendants $800, and adding the government moneys, $1550, the total sum was $4350; that plaintiff began the fulfilment of his contract; but, on the 31st December, 1866, defendants directed their secretary to notify plaintiff to discontinue his work, as the council would not be responsible for it, and a notification was accordingly made on the 2nd January, 1867; that on the 5th February, 1867, plaintiff notified defendants that he had begun the work, bought stone and wood, and transported it to the place, and employed workmen, and protested against them for all damages; and defendants having persisted in their resolution, plaintiff could not execute his contract, and defendants are bound to indemnify him for delays, for loss incurred by him, and gain which he was prevented from making; and he has a right to an indemnity for the non-construction of the entire building, which he estimates at $1000; and he has a right to demand another sum of $1000 for expenses incurred by him in the purchase of materials, their transport, and the wages of workmen, and loss of time, &c. The conclusion was for $2000, with a resiliation of the contract of the 11th of December, 1866; but, if defendants should offer to allow plaintiff to continue the work, then the conclusion was for $1000 damages and

costs. The defendants pleaded a variety of matters and, *inter alia*, that the committee exceeded their authority under the by-law, which did not authorize the construction of a public hall, and that the contract, in several other respects, deviated from the authority given by the by-law. The important question submitted to the court, is whether the committee appointed to do the work exceeded their authority. The by-law in question contains these words: " En conséquence, qu'un comité composé de 3 membres soit nommé par ce conseil, afin d'acquérir, pour le conseil municipal du comté de Chambly, et aux frais d'icelui, un terrain situé au village de Longueuil, chef-lieu du comté de Chambly, dans un endroit convenable pour construire *une bâtisse pour* le bureau d'enregistrement dudit comté de Chambly, et *pour une cour de justice* de comté, dans ce comté; à telles considérations, charges, clauses et conditions que le comité ou la majorité du comité jugera à propos, ou accepter tout terrain qui pourra être offert au comité gratuitement et à telles considérations, charges, clauses et conditions qu'il jugera à propos, et que le comité ou la majorité des membres du comité soit et est, par le présent règlement, autorisé à passer actes à cet effet; que le comité ou la majorité des membres du comité soit et est, par le présent règlement, autorisé de faire construire, pour le conseil municipal du comté de Chambly et aux frais d'icelui une *bâtisse convenable* sur le terrain qu'il acquerra, soit *en pierre* ou en brique, *avec une voûte d'une dimension* convenable, à l'épreuve du feu, pour y mettre en sûreté les archives dudit bureau d'enregistrement, et *d'une cour de justice* de comté dans ce comté; que ladite bâtisse sera construite de la dimension et de la manière qui seront jugées convenables par le comité, ou par la majorité des membres du comité, qui est, par le présent, autorisé à faire faire ladite bâtisse à telles conditions et de la manière que ledit comité ou la majorité des membres d'icelui jugera à propos." Further on, the by-law says: " Enfin, que le comité soit composé de Gédéon LaRocque, Jean-Baptiste Jodoin et Toussaint Bétournay, tous membres de ce conseil; et que tout ce que les membres du comité ou la majorité d'iceux, feront, pour les fins ci-dessus, et notamment pour l'acquisition, la construction et l'entretien d'un bureau d'enregistrement dans ce comté et d'une cour de justice de comté pour ce comté, et pour la construction et le maintien d'une voûte à l'épreuve du feu, pour la conservation des archives du bureau d'enregistrement de ce comté et de ladite cour de justice de ce comté, soit et est par le présent règlement ratifié par ce conseil. Pourvu toujours que ledit comité n'engage pas ce conseil pour une somme plus forte que celle de $2000, à être prélevée sur les propriétés imposables de la

municipalité du comté de Chambly." It will be noticed that the authority given to the committee by the council is "notamment pour l'acquisition, la construction et l'entretien d'un bureau d'enregistrement dans ce comté, et d'une cour de justice de comté pour ce comté, et pour la construction et le maintien d'une voûte à l'épreuve du feu, pour la conservation des archives du bureau d'enregistrement de ce comté et de la cour de justice de ce comté." Under this authority, what was the action of the committee? They made an agreement with plaintiff, by which he bound himself to construct a building referred to in a plan and specification, "avec entente et explication entre les parties, que les plan et dévis de ces ouvrages seront divisés en trois parties pour les deux premiers étages, et en une seule partie pour le dernier étage, de 22 pieds chacune, la première partie pour l'usage de la cour de justice, pour le comté de Chambly, la deuxième partie sera pour celle du bureau d'enregistrement du comté de Chambly, et la troisième partie sera pour celle d'une salle publique à l'usage de la paroisse de Longueuil, tel que le tout est mentionné et spécifié aux plan et dévis." Here, under an authority for the construction of a building for a registry office, court-house, fire-proof vault, the contract entered into by the committee, and which plaintiff relies upon, is for the construction of a building containing registry office, court-house, fire-proof vault, and public hall for the use of the parish of Longueuil. Apart from the question of cost of the building, which is not now discussed by the court, the corporation may have excellent reasons for objecting to the combination of a public hall, which they did not ask for, with a registry office, court-house and fire-proof vault. The court comes to the conclusion that the corporation cannot be bound by the contract declared upon by plaintiff, whose action, therefore, must be dismissed.

The judgment is as follows: "The court, considering that the committee appointed by the *règlement* of date 12th September, 1866, exceeded the powers conferred upon them by said *règlement*, by the contract which they entered into with plaintiff for the construction of a building, containing a "*salle publique*," as well as the "*bureau d'enregistrement*" and "*cour de justice*," doth maintain defendants' first plea, *pro tanto*, and dismiss plaintiff's action and *demande* with costs." (14 *J.*, p. 275)

MOREAU and OUIMET, for the plaintiff.

EDWARD CARTER, Q. C., for the defendant.

CAPIAS.—BAIL.—CONTRAINTE.

SUPERIOR COURT, Montreal, 30th September, 1870.

Coram MONDELET, J.

WINNING *et al. vs* LEBLANC *et al.*

Held: That the bail, under art. 825 C. P. C., for a defendant arrested under *capias ad respondendum*, are *cautions judiciaires* and liable to *contrainte par corps* to compel payment of a judgment against them on their bond.

On the 5th June, 1868, plaintiffs instituted an action against E.-C. Fraser, for $1818, accompanied by *capias ad respondendum*, under which Fraser was arrested. On the 25th June, 1868, Fraser was released from custody, having given bail under art. 825 C. P. C. (C. S. L. C., c. 87, s. 10). The sureties were C. Leblanc and A. Blache (now defendants). The bond was in the usual form, the bail undertaking, jointly and severally, "for and on behalf of E.-C. Fraser, that he will "surrender himself into the custody of the sheriff of this "district, whenever required so to do, by any order of said "court or of any one of the judges thereof made as by law "provided; or within one month after service upon him "(Fraser) or upon them (Leblanc & Blache) of such order, "and that, in default of his so doing, he will pay "plaintiffs their debt, interest and costs; and, in the event "of Fraser not so surrendering himself, or paying as "aforesaid, they (Leblanc & Blache), hereby, jointly and "severally, promise and undertake to pay to plaintiffs their "debt, interest and costs to the extent of $2,400." On the 27th April, 1869, judgment was rendered against Fraser for the amount sued for, interest and costs, and the *capias* declared valid. Fraser failed to fyle a statement of his affairs, as required by art. 766 C. P. C. (C. S. L. C., c. 87, s. 12), and was, on the 2nd June, 1869, under same section of C. S. L. C., c. 87, and art. 766 C. P. C., ordered to be imprisoned in the common gaol for six months, and an order to the sheriff issued accordingly. Fraser having fled the country, copies of the order was served upon the bail, with notices requiring them to produce and surrender him to the sheriff, as required by the order and as their bond stipulated. They failed to do so within the month limited in the bond, and plaintiffs then instituted this action against the bail, on the bond, for the recovery of their judgment against Fraser, interest and taxed costs, as well as those incurred on the order to imprison, and they also prayed for *contrainte par corps*. Judgment was rendered 20th

October, 1869, in their favour, *ex parte*, for the sums claimed, without pronouncing on the demand for *contrainte. Fi. fa. de bonis* issued, but the sheriff made returns of *nulla bona* against each defendant; their property having disappeared since the execution of the bond. On the 27th of May, 1870. plaintiffs obtained a rule against defendants, in these terms: " The court, etc., doth order, inasmuch as by the judgment " rendered 26th October, 1869, the defendants were, jointly " and severally, adjudged and condemned, as *cautions judi-* " *ciaires*, to pay and satisfy to plaintiffs the sum of $2099.80, " with interest, &c., inasmuch as, subsequently, a writ of *Fi.* " *fa. de bonis* issued against defendants, for the recovery of " said sums, which writ has been returned with return of " *nulla bona;* inasmuch, as the defendants do, jointly and " severally, neglect and refuse to pay plaintiffs, though " requested, said several sums, with interest and costs; and, " inasmuch as, by their declaration in this cause, plaintiffs " duly prayed for *contrainte par corps* against the defendants, " and, inasmuch as said defendants are *contraignables par* " *corps;* that a writ of *contrainte par corps* do issue, in this " cause, directed to the sheriff of Montreal, ordering said " sheriff to arrest the bodies of defendants, and each of them, " and to imprison them in the common gaol of this district, " and to detain them until they pay to plaintiffs said sum of " $2099.80, &c., and costs of this proceeding, &c., *nisi causa*, " 17th June, 1870." Blache having left the country, Leblanc alone could be personally served; he appeared, by counsel, to show cause and obtained leave to file a written contestation, which, after alleging certain facts to invalidate his bond (of which, however, at the *enquête* ordered thereon, he adduced no proof), further set forth that: " Les cautions (defendants) ne sauraient être soumise à une obligation plus considérable, ni à une pénalité plus grande que celle à laquelle fût condamné le débiteur principal, Fraser, en vertu des lois sur le cautionnement, savoir six mois de prison, pénalité à laquelle était condamné le débiteur principal, mais non à la prison pour un temps indéterminé, ou jusqu'à ce qu'ils aient payé la dette, frais et intérêts et frais subséquents, tel que demandé par la règle; " que, de plus, le cautionnement du 25 juin 1868 n'est " pas un cautionnement judiciaire, et que les cautions ne sont " point passibles de la contrainte par corps." Prayer to set aside rule.

J.-C. GAGNON, for defendant Leblanc showing cause, argued that defendant is not liable to *contrainte par corps*. Code " Civil, arts 2271, 2272. " The persons liable to *contrainte par* " *corps* are tutors &c. 2. Any person indebted as *séquestre*, " guardian, &c., 3. Any person indebted as *judicial surety*, &c."

" He is not *caution judiciaire*." Code Civil, art. 1930: "Surety-" ship is either conventional, legal, or judicial. The first is the " result of agreement between the parties, the second is re-" quired by law, and the third is ordered by judicial authority." The bail in this case was clearly not ordered by any judgment, but was solely the result of the free will of all the parties and, therefore, not *caution judiciaire*. 2. In no case can defendant, being a surety (*simple*), be condemned to a greater penalty than the principal debtor. Code Civil, art. 1933. Fraser was condemned to six months imprisonment only; while it is now sought to imprison Leblanc for an indefinite period.

R.-A. RAMSAY, for plaintiffs, in support of the rule: 1. Fraser was released and bail was put in, as allowed by C. P. C., art. 825, founded on C. S. L. C., c. 87, s. 10: " Any defendant, arrested and confined in gaol under any writ of *cap. ad resp.*, shall * * * be released from such arrest and confinement, if he gives good and sufficient security to *the satisfaction of the court* * * * or of any judge of such court, or of the prothonotary thereof, that he, the defendant, will surrender himself, &c." This procedure was established in the interest of defendants to avoid the delay which would be necessary in giving notice of a petition to put in bail as is still required in *saisie revendication*, &c. The statute does not say the defendant *must* put in bail (that might be legal suretyship only), but that he shall be released *if he gives bail, &c., i. e.* if he chooses to do so. A defendant must, therefore, in each case, be presumed to ask to be allowed to enter bail, and such bail ordered in terms of his request, all notice of application and other formalities being waived under the act. The putting in of bail is optional with defendant; and it is done with the leave and to the satisfaction of the court, &c. When, after the justification of the bail, the court is satisfied with their sufficiency, it is presumed to order that those offered and so approved be taken. They are therefore to be treated as *cautions judiciaires*. Bail to the Sheriff, under art. 828 C. P. C. (C. S. L. C., c. 87, s. 22), although not given to the satisfaction of the court as in this case, were held *contraignable par corps*. *Belle* v. *Côté* (1). Plaintiffs refer to the authorities there cited which apply to this case. 2. On defendant's 2nd point: Fraser was condemned to six months imprisonment under C. P. C., art. 776, C. S. L. C., 87, sec. 12, § 2, for neglecting to fyle a statement of his affairs after

(1) Celui qui a déposé un cautionnement au shérif en faveur d'un locataire arrêté en vertu d'un *capias ad respondendum*, pour avoir enlevé ses meubles des lieux loués et les avoir cachés dans l'intention de ne pas payer le loyer échu et de frauder le locateur, est une caution judiciaire passible de la contrainte par corps. (*Belle* vs *Côté*, C. C., Montréal, 31 décembre 1868, BEAUDRY, J. A., 13 J., p. 26, et 19 R. J. R. Q., p. 73)

the *capias* was maintained. Leblanc is to be *contraint par corps* until he pays the judgment against him, not for that penal neglect, but because, being *caution judiciaire*, he has neglected to pay a judgment obtained on his bond, in consequence of his failure to surrender Fraser, in terms of the order for his imprisonment. The grounds of detention are therefore distinct, and the article cited by defendant does not apply.

The defendant's contestation was dismissed and rule made absolute, the Hon. Judge remarking that he considered the case clearly one of *caution judiciaire*. (14 *J.*, p. 298)

R.-A. RAMSAY, for plaintiffs.

J.-C. GAGNON, for defendant Leblanc.

CONTRAINTE PAR CORPS.

SUPERIOR COURT, Montreal, 30th December, 1870.

Coram TORRANCE, J.

WINNING *et al. vs* LEBLANC *et al., and* LEBLANC, petitioner.

Held: That arts 773 777 C. P. C. apply to debtors in custody on *contrainte par corps*, as well as to those detained on *capias*; and that, under art. 777, such debtor cannot obtain his discharge until four months have elapsed from the filing of a schedule and declaration of abandonment.

A rule absolute for *contrainte par corps* was made (30th September, 1870) against defendant Leblanc, as *caution judiciaire*. Vide *suprà*, p. 237. On 19th December, 1870, Leblanc fyled a schedule of his creditors and declaration of abandonment (*Bilan et Cession*) in the terms of art. 764 C. P. C.; and, having given notice thereof to plaintiffs, DOUTRE, Q. C., 23rd December, 1870, presented a petition for his discharge from custody, contending that he had complied with all the the requirements of law, and was entitled to his release at once under art. 793 C. P. C.

R. A. RAMSAY, for plaintiffs, opposed the application for immediate release, urging that, although, under art. 793 C. P. C., the debtor so imprisoned " may obtain his discharge : " 4. By the abandonment of his property, as mentioned in the " proceeding section," yet, the mode of such discharge must be governed by the clauses of that preceding section; that, thereunder (art. 773 C. P. C.) the detaining creditor is allowed *four months* from the fyling of the schedule, when the debtor is in prison, and two years when he is at large en bail, to contest the correctness thereof; and that the debtor is not entitled to his discharge until these four months have elapsed,

while plaintiffs' contestation of the schedule may be produced at any time during that term, and then, if he can prove his allegations within that period (art. 774 C. P. C.), the defendant becomes liable to further imprisonment under art. 776. That it is only after those four months that the release can be obtained, is shewn by art. 777. "If the allegations of the con-" testation are not proved, within the delays above mentioned, " the court or judge may order the discharge of the debtor." The provisions of C. S. L. C., chap. 87, from which the articles of the C. P. C. are framed (*Vide* authorities of the commissioners) are even clearer; section 13, § 3: "But if no omission " * * * is established * * then the said court, &c., *at the expi-* " *ration of the said period of four months*, may order the de-" fendant to be discharged from his imprisonment."

DOUTRE, Q. C., in reply, argued that the clause of C. S. L. C. cited, applied to arrests on *capias* only; as did also the art. 776 C. P. C. The whole section of C. P. C. (abandonment of property) applied to debtors arrested on *capias* alone (*Vide* the first article thereof, 763), except article 764, relative to the form of the schedule and abandonment, which was, by the article 793, made to apply to prisoners on *contrainte*; and the latter article does not provide for any longer detention and must be held to contemplate an immediate release. No distinct enactment of this four months' imprisonment being made, the court cannot imply it, and on a mere implication restrain the liberty of the subject.

PER CURIAM. The petitioner (defendant) asks for his liberation. He is in jail to answer for the amount of the judgment rendered against him. The plaintiffs object that he has not yet been in jail four months, which they claim must elapse after the fyling of his statement before he can obtain his liberation. The court is of opinion that the plaintiffs' objection is well founded, and therefore rejects the petition. (14 *J.*, p. 335)

R.-A. RAMSAY, for plaintiffs.

DOUTRE, DOUTRE and DOUTRE, for defendant Leblanc.

JURIDICTION.

SUPERIOR COURT, IN CHAMBERS,
Montreal, 27th September, 1870.

Coram TORRANCE, J.

SÉNÉCAL *et al. vs* VIENNE, *and* DIVERS, opposants.

Held: That, by C. C. P., art. 876, taken in connection with C. C. P., art. 645, a judge in chambers has jurisdiction to appoint a sequestrator to an immovable seized under an execution when its sale has been stopped by an opposition.

The plaintiffs, on the 25th August last, presented a petition, in chambers, to Mr Justice TORRANCE, having given notice previously to defendant, for the appointment of a sequestrator to an immovable of which the sale under an execution had been stopped by an opposition. The article C. C. P., art. 645, gave jurisdiction to the court, in this matter, but a later article, C. C. P., art. 876, says that all demands for sequestration may be presented to the court or to a judge. Petition granted. (14 *J.*, p. 335)

DORION, DORION and GEOFFRION, for petitioner.

SAISIE D'IMMEUBLES.

COUR SUPÉRIEURE, EN REVISION, Montréal, 31 Octobre 1871.

Coram MONDELET, J., TORRANCE, J., BEAUDRY, J.,

SÉNÉCAL *vs* VIENNE, *et* VIENNE, opposant.

Jugé: 1° Qu'il n'est pas nécessaire que le procès-verbal d'une saisie immobilière soit fait et signé sur les lieux où les immeubles sont situés. (1)
2° Qu'il est valablement fait au domicile du saisi.

Par jugement rendu le 30 mars 1871, la Cour Supérieure à Montréal (MONDELET, J.) a maintenu l'opposition à fin d'annuler du défendeur. Cette opposition, entre autres moyens, reposait sur le suivant, parce qu'il n'apparaît pas, par le procès-verbal de saisie immobilière, que le député-shérif se soit transporté sur aucun, ni sur chacun des immeubles y désignés, pour en faire la saisie. Cette opposition avait été contestée par les demandeurs qui portèrent le jugement en revision,

(1) C. P. C., arts 637 et 638.

et prétendirent qu'il n'est pas nécessaire de faire cette mention dans le procès-verbal, ni qu'il n'est pas nécessaire que le procès-verbal soit fait et signé sur les lieux où les immeubles sont saisis. C. P. C., art. 638. L'opposant cita à l'appui de ses prétentions: 1 Pigeau, éd. 1779, pp. 700 et 701; 4 Ferrière, *Com. Cout. P.*, p. 1195, n° 32; Ravaut, éd. 1788, p. 282. La Cour de Revision ayant entendu les parties infirma le jugement rendu en faveur de l'opposant.

PER CURIAM: The court below maintained the opposition of the defendant to the seizure based on informalities in the seizure. The bailiff need not go to each immovable; it is sufficient for him to write the description of each of them at the domicile of the defendant, as in this case, and the judgment on this opposition is consequently reversed.

Le jugement est comme suit: "La Cour Supérieure, siégeant à Montréal, comme Cour de Revision, considérant qu'il y a erreur dans le jugement rendu sur l'opposition de Vienne, le 30 mars 1871, par la Cour Supérieure, a cassé et annulé ledit jugement; considérant, de plus, que les moyens invoqués par Vienne, défendeur et opposant, en sadite opposition, sont mal fondés, et insuffisants en loi et en fait, et que les allégués d'icelle ne sont pas prouvés; rendant le jugement qui aurait dû être rendu, a renvoyé ladite opposition avec tous les dépens." (3 *R. L.*, p. 523)

DORION, DORION et GEOFFRION, avocats des demandeurs.

CARTIER, POMINVILLE et BÉTOURNAY, avocats de l'opposant.

PROCEDURE.

COUR DE POLICE, Québec, 19 juin 1869.

Présent: Son Honneur le JUGE DES SESSIONS.

Le Capitaine du vaisseau étranger ANNA-DELIUS *vs* MICHAEL PAULSON.

Jugé: Que les parties seules ou représentées par leurs avocats peuvent plaider devant les Cours de Police, et qu'elles ne peuvent se faire représenter par une autre personne.

Dans cette cause, le greffier de la cour conduisait la poursuite et, sur objection de la part du défendeur, il a dû être remplacé par un avocat. (3 *R. L.*, p. 524)

M. COOK, pour la poursuite.

M. WILLAN, pour la défense.

ASSURANCE CONTRE L'INCENDIE.

COUR DU BANC DE LA REINE, EN APPEL,
Montréal, 20 septembre 1873.

Présent: DUVAL, J. en C., DRUMMOND, J., BADGLEY, J., dissident, MONK, J., dissident, et TASCHEREAU, J.

JOHN WHYTE, en sa qualité de syndic à la faillite de RICHARD DAVIES, demandeur en cour inférieure, appelant, *et* THE HOME INSURANCE COMPANY, défenderesse en cour inférieure, intimée.

Jugé: Que le cessionnaire d'une police d'assurance contre l'incendie est soumis aux conditions de la police comme l'assuré lui-même, et qu'il est tenu de donner les avis et de fournir la preuve du sinistre comme l'assuré lui-même y était tenu, et que, si les avis et la preuve requis par la police ne sont fournis ni par l'assuré, ni par le cessionnaire, ce dernier ne pourra recouvrer le montant de l'assurance.

Le 30 septembre 1870, la Cour Supérieure, à Montréal, TORRANCE, J., a rendu, en cette cause, jugement maintenant l'action du demandeur ès-qualité. Voici les remarques faites par l'Honorable Juge, en prononçant le jugement, et le jugement même de la cour supérieure:—

TORRANCE, J.: This is an action on a fire policy, to recover $2,000. It was instituted on the 8th June, 1869, by plaintiff, in his quality of assignee to Edward-Fleming Miller. The declaration of plaintiff sets forth that, on the 12th May, 1868, a policy was issued by defendants, in favor of Edward Fleming Miller, insuring him against loss or damage by fire, to the amount of $2,000, namely on a store in the village of Richmond. $1,000, and on goods therein $1,000; that previous to 28th March, 1868, Miller carried on business in partnership with William-Scott Miller, under the name of W. S. and E. F. Miller; that, during the partnership, the firm, out of its assets, built the said building on land the title to which was in W. Scott Miller, and, when the firm was dissolved, the building was its property; that, on the said 28th March, the firm was dissolved, and W.-S. Miller transferred to E.-F. Miller all his right, title and interest in said building and stock, for a consideration of $1750, payable in three notes, the first for $600, payable in one year, the second for $600, payable in two years, and the third for $550, payable in three years, from the 28th March, 1868; that, by virtue of the said purchase by E.-F. Miller, the latter became and was the substantial owner of the said building, and had an insurable interest therein at the time of effecting the insurance, and, thereafter, until its destruction, which took place by fire on 28th September, 1868,

when the goods, saving the value of about $200, were also destroyed; that, at the time of the fire, the building was worth $2,800, and the goods were worth $3,784. The defendants, by a first plea, set forth that, by a condition of the policy, the interest of the assured, whether as owner, consignee, factor, mortgagee, lessee or otherwise, in the property, had to be truly stated in the policy, otherwise the policy should be void; that E.-F. Miller, at the time of effecting the policy, did represent himself to be the absolute owner of the building, and, in fact, he was not owner, but the title to the buillding was in William-Scott Miller; that the interest of Edward-Fleming Miller assured under the policy was that of owner, whereas the assured was not owner, and, therefore, the policy is null and void. By a second plea, defendant set forth a condition of the policy, that the interest of the assured should be set forth in the proofs of loss verified by affidavit, and, if there should appear false swearing, then, the insured should forfeit all claim under the policy, and that there was a false affidavit. The chief question is, whether the policy was void because there was no deed of the property to Edward-F. Miller, and whether the evidence of record is sufficient to prove the ownership to be in Miller, the insured, without such deed. As to the evidence of record, there is a letter from William-Scott Miller, now deceased, of date 22nd January, 1869, in which he writes to the insolvent: "The whole transaction was with both companies, in good faith, and I trust they will not be allowed to take an unprincipled advantage of any flaw that may exist, or oversight that may have occurred, in the transfer of the goods and stock, &c." We have next the fact of E.-F. Miller being in possession of the land and stock, and his evidence, and that of the widow of W.-S. Miller, and their production of the notes given, proving the agreement for a sale by W.-S. Miller to E.-F. Miller, so far as verbal testimony could prove it. The defendant has made a motion to reject the evidence of witnesses tending to prove the sale from W.-S. Miller to E.-F. Miller. Is the evidence admissible to the extent of proving that E.-F. Miller had an insurable interest in the building and goods insured, and that he was owner of them though the title of the land was in another? I find several American cases in which it has been done. I refer counsel, in the first place, to Angell, on Insurance, § 69, p. 120: "A right must be of such a nature, in order to constitute an interest, as the law will recognize and enforce, for a mere *moral* title will not sustain an insurance." After giving cases where the policy was held void, he says, p. 121: "Upon the same principle the purchaser of an estate who has merely entered into a *verbal* contract cannot insure, but if any act has been

done constituting such a part fulfilment of it as would entitle him to a specific performance in a Court of Equity, he may do this, since an equitable title creates an interest which the law will recognize." In the present case, if the widow and children of W.-S. Miller were to bring an action against E.-F. Miller to recover possession of this land, as belonging to the estate of the deceased W.-S. Miller, would they succeed with such evidence as there is of record against them ? The court inclines to think not. In the case of *Converse* vs *Citizens Mutual Insurance Company*, 10 Cushing (Mass.) R., 37, it was held that " one partner may have an insurable interest in a building purchased with partnership funds, although it stands upon land owned by the other partner." In *Curry* vs *The Commonwealth Insurance Company*, 10 Pickering, 535, the house insured belonged to the plaintiff's wife and her sister, was acquired by him, and he moved it to the back of the lot, the title to which was in his wife and her sister, and built in addition in front towards the street, thereby making the dwelling house insured by him, and the court held that the insurance made by plaintiff on the building as his own was recoverable, there being no fraud. In *Fletcher* vs *The Commonwealth Insurance Company*, 18 Pickering, 419, the plaintiff obtained insurance on his one-story framed store, occupied by him, without disclosing the fact that it stood on the land of another person under a verbal agreement, terminable at the pleasure of such person, upon six months' notice, neither was any inquiry made by the insurers in regard to the title. It was held that there was not a concealment of a material fact, and that the policy was not void. The court here sees a difference between this case and the case under consideration, but they agree in this that the title of the land was in another person. In *Tyler* vs *Ætna Fire Insurance Company*, 12 Wendell, 512, NELSON, J., says: " It has been deliberately settled in Massachusetts, as an established principle of the law of insurance, that a *bona fide* equitable interest in property of which the legal title is in another, may be insured under the *general name of property*, or by a description of the thing insured, unless there be a false affirmation or representation, or a concealment after enquiry of the true state of the property ; and the applicant need not represent the particular interest he has at the time, unless inquired of by the company." In *Kenny* vs *Clarkson et al.*, the plaintiff purchased of Messrs Douglas, Stewart and Minot, at Jamaica, the vessel insured by the defendants for $3,000, at which time he paid $1,800 in part. No bill of sale was executed, but the vessel was delivered to the plaintiff, and an agreement, in writing, was entered into between him and Douglas, Stewart

and Minot, by which it was agreed that the vessel should continue in the name of the vendors, until the residue of the purchase money was paid, when they promised to deliver to plaintiff the register and a regular bill of sale. The plaintiff remained in possession of the vessel from the day of the purchase until the time of the insurance and subsequent loss. It was there held by the Supreme Court of the State of New-York, that the plaintiff had an insurable interest (1 Johnson's R., 385). The court has bestowed much attention on this case, and comes to be conclusion that plaintiff is entitled to judgment in his favor. The equities of the case, so far as shewn by the evidence, are entirely in his favor, and, if the pleas of defendants are to be maintained, they must succeed by the judgment of a higher court.

The judgment is as follows: "The court, having heard the parties, as well upon the motion of defendants to reject the evidence given by plaintiff, as upon the merits; considering that plaintiff was well founded in proving, by verbal testimony, the insurable interest of the insolvent, E.-F. Miller, in the building described in the policy and in the goods contained in said building, doth reject said motion; and, considering that defendants have failed to prove the allegations of their plea, doth reject the same; and considering that plaintiff hath proved by sufficient evidence the material allegations of his declaration; that the defendants insured E.-F. Miller against fire, $1,000 on said building, $1,000 on said goods; that the said building and goods were destroyed by fire on the 22nd September, 1868, and that E.-F. Miller lost, by said fire, much more than the said two sums of $1,000 each, and that the defendants are liable therefor under said policy; doth adjudge et condemn defendants to pay and satisfy to plaintiff, in his quality of assignee to the estate of E.-F. Miller, the said two sums of $1,000 each, to wit $2,000 in all, with interest thereon from the 10th day of June, 1869, date of service of process in this cause, and costs of suit." (1)

Le défenderesse porta la cause en revision et, le 30 janvier 1872, la Cour Supérieure, en revision, à Montréal, MONDELET, J., BERTHELOT, J., et MACKAY, J., infirma le jugement de la Cour Supérieure, et rejeta l'action du demandeur, avec dépens, par le jugement suivant :

"The court, considering that plaintiff, *cessionnaire* of Henry-J. Clarke, was, by the policy of insurance granted him by

(1) *Authorities of defendants :* Quenault, *Assurance*, n° 167, p. 137 ; Agnel, *Assurance*, n°s 26, 27, 28, n° 195, pp. 146, 7, (n° 8) and p. 80, n° 118 ; 11 U. C. Q. B. Rep., 73, *Shaw* vs *Saint-Lawrence County Mutual Insurance Company* ; 10 U. C. Q. R. Rep., 525, *Walsworth* vs *Saint-Lawrence County Mutual Insurance Company ;* Journal du Palais, Rep. gén., v° *Assurance Terrestre*, p. 70, n° 183.

defendants, and became liable and bound by the conditions and stipulations in and by said policy of insurance in all respects as Henry-J. Clarke himself was; considering that plaintiff nor Henry-J. Clarke have in any wise, after the fire in question in this cause, proved, as they were bound, such loss and given to defendants such notice as by the conditions in and by the policy of insurance aforesaid stipulated should have been proved and notified to defendants; considering that, after the fire, there has not, by Henry-J. Clarke or by plaintiff, been furnished to defendants such statement of loss, under oath, in conformity of the stipulations of said policy of insurance and according to law and such proof as required of such loss by Henry-J. Clarke; considering, therefore, that plaintiff is in no wise entitled to claim of and from defendants the sum of $5,000 or any part or portion thereof; considering that the jury have found that there has been no waiver by defendants of the condition of the policy; considering that plaintiff's motion is unfounded, the same is dismissed with costs; and inasmuch as defendants' motion to have judgment in their favour upon said verdict of the jury and the pleadings and evidence in this cause, is well founded, the same is hereby granted, and plaintiff's action is dismissed with costs."

Le demandeur a appelé de ce jugement; mais la Cour d'Appel l'a confirmé. (14 *J.*, p. 301, et 2 *R. C.*, p. 232)

J.-J.-C. ABBOTT, pour l'appelant.

CARTER et HATTON, pour l'intimée.

APPEL AU CONSEIL PRIVE.

COURT OF QUEEN'S BENCH IN APPEAL,
Montreal, 22d March, 1875.

Coram DORION, Ch.-J., MONK, J., TASCHEREAU, J., RAMSAY, J., SANBORN, J.

WHYTE, appellant, *and* THE HOME INSURANCE COMPANY, respondents.

Held: The Court of Appeal has no authority to declare an appeal to the Privy Council deserted, even although the record has not been transmitted, if a certificate be fyled that the petition of appeal to Her Majesty in Council has been lodged in the Privy Council office, and that the appeal stands referred to the Judicial Committee.

The following certificate was fyled in this court: "I hereby certify that the petition of appeal to Her Majesty in Council

in the above appeal, from a decree of the Court of Queen's Bench for the Province of Quebec, Appeal Side, of the 20th September, 1873, was this day lodged in the Privy Council office, and that the appeal now stands referred to the Judicial Committee, under the provisions of Her Majesty's General Order of Reference on the 20th November, 1873. Privy Council Office, 21st February, 1874, (Signed)—HENRY GREAVE, Reg. P. C."

DORION, C. J., rendering judgment, said: A motion was made by respondents to declare the appeal deserted, not an appeal to this court, but an appeal to the Privy Council from a judgment of this court. This court has before it the certificate that the appeal has been lodged in the Privy Council. It appears, however, that the record has not been transmitted, and respondents move that, on this ground, the appeal be declared deserted. This court has no authority to do that. The question must be raised in the court above. The motion is therefore rejected. (19 *J.*, p. 196)

CROSS, LUNN and DAVIDSON, for appellant.

EDWARD CARTER, Q. C., for respondents.

INSURANCE.

PRIVY COUNCIL, 9 March 1875.

Present: Sir JAMES-W. COLVILE, Lord Justice JAMES, Lord Justice MELLISH, and Sir MONTAGUE-E. SMITH.

JOHN WHYTE, appellant, *and* THE WESTERN ASSURANCE COMPANY, respondents.

Held: 1. That, where a policy of fire insurance has been transferred in trust, and a condition of the policy requires that the assignor shall, in such case, make and furnish the necessary proofs in support of the claim for loss before the same shall be recognized and payable, the making and furnishing of such proofs by the assignor and not by the assignee is a condition precedent to the right by the assignee to recover the amount of the loss.

2. That, where a condition of a fire policy requires the making and furnishing of proofs of loss within a specified time, and declares that, until they are furnished, the loss shall not be payable, the delay is a material part of the condition, and, consequently (in the absence of waiver) the assured cannot recover, unless he sends in the proper proofs within the prescribed delay.

3. The mere silence of the company, with regard to proofs sent in after the delay prescribed by the condition of the policy, does not amount to a waiver of the condition by the company, nor does the declaration by the company at that time, that it did not consider itself liable, amount to a waiver by the company of the benefit of the condition.

This is an appeal from a judgment of the Court of Queen's Bench in Lower Canada, affirming a judgment of the Superior Court in Review. The action was on a policy of insurance against fire, brought in the name of Whyte, who was an official assignee of the effects of Davies, who was an insolvent and who claimed as the assignee of the policy from one Clarke. There were pleas raising several defences, and according to the practice of the court in Canada, the court settled a number of questions on points of fact which were put to the jury at the trial, and their answers are before their Lordships.

Here follows the charge of the Honorable Judge TORRANCE who presided at the trial, in the Superior Court, at Montreal, on the 14th March, 1872 :

TORRANCE, J.: The claim in this case is founded upon a policy of insurance transferred from Henry J. Clarke to Whyte. What was assigned by this transfer which was made on the 29th April, 1870? It was not the Dominion Glass Works Factory, or the buildings of the factory. It was a money claim which must, under certain circumstances, be made payable by the insurance. This was what was assigned on the 29th April, 1870. These insurance policies, I may remark, are difficult to understand. They sometimes contain conditions which are fair objects of criticism. But there are conditions in insurance policies, which you may see, are the result of wisdom and experience. If it were possible for insurance companies to carry on business without some such restrictive conditions, no doubt some new company would rise up, stock would be taken in it, and it would undertake to do business of insurance without any such conditions. But there is no doubt that, without some such conditions, the business of insurance could not be carried on the ordinary terms with a reasonable profit. There is no question but that there was a loss in this case. I will now call your attention to the defence which has been raised to the claim of plaintiff. The gist of the defence, for I will not trouble you with details, so far as your attention requires to be directed, is comprised under three heads:—Firstly, that there was no insurable interest covered by this policy of insurance, transferred from Henry J. Clarke to Whyte, assigned; secondly, that no notice of the loss was given by Clarke, and that no claim was furnished by him, and sworn to by him, as was necessary; that the only claim was one produced by Whyte, with which defendants had nothing whatever to do; thirdly, another point is that, by one of the conditions of policy, two affidavits were required to be produced within 30 days, &c., before the insurer could claim his insurance. Your attention is specially called to these points: First, the charge of defendants that there was no in-

surable interest shown by Clarke, or by plaintiff as representing Clarke; that proper notice was not given; and that no affidavits of competent persons were sent in within the thirty days. It is necessary here to say one or two words, with regard to the relations which seem to have existed between Davies and Clarke. These relations seem to have been of a very intimate and very curious character. Quite a variety of deeds have been shown to have passed between them. First, the purchase with which Clarke had nothing to do, from Molson. This was on the 3rd February, 1869. A few days after, there was a sale by Davies to Clarke for a consideration of $10,000, alleged to have been paid by Clarke to Davies. On the same day, there was a mortgage executed for the sum of $10,000, in favour of Mrs Clarke the wife of H.-J. Clarke. The same year, on the 30th October, there was a sale of the plant of the Dominion Glass Works by Davies to Clarke. A short time afterwards (three months), there was a mortgage by Davies of this property to Mulholland and Baker, to which Clarke was a party. Then comes the assignment by Davies to the plaintiff in his quality of assignee, in the present cause, dated 10th March, 1870. A short time after that, there is a claim by Clarke against the insolvent estate of Davies, for the very large sum of $35,000, for money loaned and advanced to Davies, Clarke holding as security, as he alleged, a $20,000 mortgage on the real property, and a bill of sale on the movables. Then, on the 9th April of the same year, there is a letter addressed by Clarke to plaintiff, and to which your attention should be particularly directed. This letter was a few days before the transfer of the policy by Clarke to plaintiff, and it will be for you, gentlemen, from your experience and knowledge of business transactions, and from the testimony in the case, to say whether this transfer of the 29th of April was attached to the letter of the 19th, addressed ten days previously by Clarke to Whyte. If that letter of the 19th April should be adhered to, you, as men of business, should pronounce on it without difficulty. As to the other transactions, I may say, that on the 2nd September, 1870, there was a transfer made from Mrs Clarke of her mortgage to Mulholland and Baker, and on the same day, there was also a transfer to the same parties of Clarke's claim for $35,000. I would remark concerning Davies, that the relations between him and Clarke were of a peculiar character. He seems to be a very illiterate man. It was difficult for him to make out what the papers meant which were shown to him as a witness in this case, and he asked to have them read to him. All these transactions, which, if we believe the evidence as to the validity of these claims amounting to from $30,000 to $50,000, seem to have been kept by Davies in

a little black book. This is the only book of account which he thought necessary to keep in connection with this business, and Clarke seems to have been satisfied with this way of keeping books. The first point you have to decide is as to the question of the insurable interest. Is that insurable interest proved? It must be an insurable interest as mortgagee or proprietor. What was the insurable interest which Clarke had in the property? With regard to the real estate, there is the deed of the 20th February, 1869. It seems to have lain forgotten and unused for upwards a year. Was this a *bona fide* deed upon which Clarke's claim against the insurance company rests. Then, with regard to the plant, this was transferred from Davies to Clarke. There is no proof, as far as I have seen, of any delivery by Davies to Clarke, although in our law I may say that the sale of this plant would probably be regarded as a good transfer, but, as the defendants have stated against the validity of this being a *bona fide* transfer, there is the fact that Clarke, a long time afterwards, makes a claim for $35,000, and that claim he afterwards transferred, as his own property, to Mulholland & Baker. And this claim for $35,000 was over and above the amount that was covered by the transfer of the plant. Speaking, as the court, I do not see how Clarke could say he was proprietor of this plant, if it was covered by his mortgage claim of $35,000; because, taking it under our law, he could not hold what in Upper Canada as known as a mortgage chattel. Again, another question comes up. Was every condition of the agreement with the insurance company complied with? The policy, as I have stated, contains this condition: "All persons insured in this company &c.," (9th condition of policy). The plaintiff has contended that the person referred to, is the person holding the transfer of the policy (Whyte) and not Clarke. I should call your attention also to the stipulation that the claim must be supported by affidavits. The plaintiff has acted on the principle that it was quite sufficient if he (Whyte) supplied the affidavits. It is the duty of the court to say to you that the person insured by the company was Clarke, and it was he whose oath was required. I must say that I regret that Clark was not in the witness-box, to give an account of these transactions. Perhaps, if he had been here, some light, which is wanting now, might have been thrown upon these singular transactions. The court, then, holds that plaintiff should have furnished a claim, under oath of Clarke, in order to satisfy the terms of the 9th condition of the policy. Also, that the affidavits of competent persons should have been furnished within thirty days. This was not done. The plaintiff says that the compliance with this formality was waived; but the court does not see any waiver

of this condition. You will, however, pronounce upon this point for yourselves. I will say, in conclusion, that while it is the duty of the court to lay down the results of the case, as regards the law, it is your duty to pronounce upon them with regard to the facts. You are not to decide in favor of a rich person or a poor person. You are to call one A, and the other B, and pay no regard whatever as to whether one is rich or poor; you are the judges with regard to this matters of fact. I will merely say this, that if nine of you agree with regard to the answers, it will be sufficient to carry a verdict. I would ask you to exercise great care as to the answers you will give. If there is any slip in the answering of these questions definitely, a new trial will be necessitated, which will be very much to be regretted, after the labours you have already gone through in this matter. With regard to this case, I may say that there was another case very similar in its character decided about three months ago. The judges, in their decision of the matter, were unanimous and agreed with the charge of the judge at the trial; and I believe that the remarks, which I have now addressed to you, are very much in accordance with the judgment in that other case. I would say, with regard to the first question, that much importance is attached to it. Whether the letter addressed by Clarke, of the 19th April, is to be attached to the transfer of the policy of the 29th April; whether the two go together, so that the transfer is for the benefit of certain individuals or is for the benefit of the official assignee, for the creditors generally. Second-Had Henry-J. Clarke an insurable interest, etc., and to what extent? Third question—as to false representations—I need not call your attention to this question, because it is not necessary for you to be detained in giving an answer. You will, I think, have no difficulty in arriving at a negative conclusion, although you are the judges. The fourth question is with regard to the amount of property that was destroyed. You are here the special judges as to what the loss was to plaintiff. It was not an entire loss. There was an office and a shed not destroyed, and there were sundry movables, of between $400 and $500 worth in all. The next question is with regard to the guardian. With regard to the question, "Was the defendant's risk increased?" I personnally would answer that question in the negative, but it is for you to determine. Next is the 5th question. — This brings up the question of the insurable interest. Did the plaintiff in his capacity of assignee suffer loss or damage? This depends upon whether Clarke suffered any loss or damage. 6th The next question is a very important question: "Whether plaintiff has complied with the formalities and conditions in the terms

of the policy?" Here there is no affidavit by Clarke, as the person insured. As the court interprets this condition, Clarke's duty was to supply the affidavit sworn to by himself, and the non-fulfilment of this duty cannot be overlooked. Then, there is another question: "Were any of the conditions of the policy waived by defendants,—how and by whom?" If you see evidence of any waiver of any of the conditions, you can state in what way these conditions were waived, and by what persons they were waived. The court, from very close observation of the evidence, does not see any waiver of the conditions of the policy. The next question is as to whether plaintiff's sworn claim, after the fire, was true, and did it truly represent the subject insured, etc?" You will have to make *use of* the conclusion which you arrive at with regard to the insurable interest in this property, whether it was in Clarke or in plaintiff? There is a contradiction in the statement sworn to by Whyte, because he states at the beginning, that the Dominion Glass Works were owned by the insolvent estate. In other words, if they were owned by the insolvent, they could not be owned by Clarke. Then he states that Clarke was the mortgagee of the buildings and owner of the plant. It is for you to pass your judgment upon this claim. Then there is the question with regard to the increase of risk. Did Clarke or plaintiff increase the risk? I do not see myself that there has been any increase of the risk. And with regard to plaintiff's negligence. Was he negligent in connection with his care of the property? I do not see that any act of negligence can be brought home to plaintiff, though you will answer this question as you think best. Then again, has plaintiff included in his claim against defendants, property not destroyed by the fire? If so, say what? There was a slight mistake in the amount of the claim, it being a claim for a total loss, when credit should have been given for $500 worth of property not destroyed. The last question is whether defendants asked for any other and further particulars as to plaintiff's claim, and did plaintiff refuse to furnish these, and what are these? Answer according to your knowledge. With these remarks, the court will leave you to consider your verdict.

After the trial a motion was made both by the plaintiff and by the defendants to have judgment entered for them respectively upon the findings. There was also an application made on the part of the plaintiff for a new trial on the ground of mis-direction of the judge on certain points which arose during the trial. The Court of Review, sitting at Montreal, on the 30th April, 1872, BERTHELOT, J., MACKAY, J., and BEAUDRY, J., ordered judgment to be entered for defendants on several grounds and refused a new trial. Here follows the judgment of the Court of Review:

" The court, considering that the assignment to plaintiff, as *cessionnaire* of the interest of Henry-J. Clarke in the policy of insurance granted him by defendants, was subject to the conditions of and stipulations in said policy; considering that plaintiff nor Henry-J. Clarke, after the fire in question in this cause, proved such loss by Clarke and gave to defendants such notice, as by the conditions in and by the policy of insurance aforesaid stipulated should have been proved and notified to defendants; considering that, after the fire, there has not, by Henry-J. Clarke or by plaintiff, been furnished to defendants such statement of loss under oath, in conformity of the stipulations of said policy of insurance and according to law, and such proof as required of such loss by Henry-J. Clarke; considering that the jury have found that there is no evidence that defendants waived any of the conditions of the policy, and that this finding is submitted to by plaintiff's motion for judgment; considering that the policy and indorsation upon it do not show transfer of the interest of H.-J. Clarke therein to plaintiff, in quality of assignee to the insolvent estate of Richard Davies; considering that plaintiff is in no wise entitled to claim of and from defendants the sum of $5,000 or any part or portion thereof; considering that, upon the trial of this cause before the jury, no misdirection of the judge was, nor irregularity in or about the taking of the verdict, the plaintiff's motion for judgment is dismissed with costs; and the plaintiff's motion for a new trial is also dismissed with costs; and defendants' motion to have judgment in their favour upon said verdict of the jury, and the pleadings and evidence in this cause, and to have plaintiff's action dismissed, being well founded, the same is hereby granted and plaintiff's action dismissed with costs."

Plaintiff appealed to the Court of Queen's Bench and that Court (DUVAL, C. J., DRUMMOND, J., BADGLEY, J., dissenting, MONK, J., dissenting, and TASCHEREAU, J.), on the 20th September, 1873, affirmed the judgment of the Court of Review, though there was a difference of opinion among the judges.

Now the question that we have heard argued has been the question whether there ought to be a new trial on the ground of the misdirection of the judge during the trial, because it is admitted, on the part of the Plaintiff, that there is one defence which on the findings is properly found for defendants; and that depended upon a condition in the policy as to the proofs which were to be made after the fire, before the action could be brought, and that was the ninth condition in the policy, which was in these words: " All persons assured by this com-
" pany and sustaining loss or damage by fire, are to give im-
" mediate notice thereof to the secretary or manager of the

" company or to the agent of the company, should there be
" one acting for it in the neigbourhood of the place where
" such fire took place, and shall within 30 days after such
" loss or damage deliver to the secretary or manager, or to
" the agent of the company as aforesaid, a full and detailed
" account of such loss or damage, signed with their own hands
" and verified by their oath or affirmation; they shall also
" declare on oath or affirmation, whether any or what other
" other assurance has been made on the same property,
" what was the whole actual cash value of the subject as-
" sured and what their interest therein; in what general
" manner (as to trade, manufactory, merchandise, or other-
" wise) the building assured, or the building containing the
" subject assured and the several parts thereof, were occupied
" at the time of the loss, and who were the occupants of such
" building; and when and how the fire originated, so far as
" they knew or believe; and in case of buildings, machinery,
" or other fixed property, they shall further accompany the
" said statement by the affidavit of two builders, machinists,
" or other competent persons acquainted with the premises
" preceding their destruction or damage, as to the cash value
" of the same at the time of the fire, to the best of their knowl-
" edge and belief; and also shall produce such other evidence
" as to any loss or damage by fire as this company or its
" agents may reasonably require. They shall also produce a
" certificate within the said 30 days, under the hand and seal
" of a magistrate or notary public, most contiguous to the
" place of the fire, and not concerned in the loss, stating that
" he has examined the circumstances attending the fire, loss
" or damage alleged, and that he is well acquainted with the
" character and circumstances of the claimant, and verily
" believes that he, she, or they have, by misfortune and with-
" out fraud or evil practice, sustained loss and damage on the
" subject assured to the amount which the magistrate or notary
" public shall certify; and whenever required in writing, the
" assured or person claiming shall produce and exhibit his
" books of account, invoices, or certified duplicates thereof
" where the originals are lost, and other vouchers to the
" assurers or their agents, in support of his claim, and permit
" extracts and copies thereof to be made; and until such
" proofs, declarations and certificates are produced, the loss
" shall not be payable; and if there appears any fraud or false
" swearing in the proofs, declarations or certificates, the as-
" shall forfeit all claim under this policy," Then further on it
says: " And in case this policy should be assigned in trust or
" as collateral security, when loss or damage arises, it shall
" be the duty of the assignor to make and furnish the necessary

"proofs in support of the claim before the same shall be "recognized and payable." Now, after the fire had taken place, and within a short time afterwards, namely, on the 30th of June, 1870, Whyte sent in a claim; therefore, he so far complied with the conditions; and afterwards he sent in a certificate of a notary public, and no defence is raised on account of any defect in that. But nothing more was sent in within the 30 days. After the 30 days were over, somewhere between the 1st and the 5th of August, he sent in a valuation, which was signed by two builders and two blacksmiths, and a manager, but it was not on oath or affirmation. He probably sent in some additional voucher, though what precisely it was does not appear on the evidence; and then he wrote this letter, addressed to the agents of the defendants: "Dear Sirs, I have not "received from you any request for additional vouchers in "support of my claim made upon the 'Western' Insurance "Company, in the matter of the loss by fire at the Dominion "Glass Works on the night of the 9th and 10th June last, but, "as I am furnishing the other companies with an additional "voucher, I do also in this case. I hope the proofs and "vouchers will be considered satisfactory, and will be glad to "hear from you to that effect." That was signed "John Whyte, assignee." To that letter the company sent no answer at all. Then, on the 24th of august, 1870, Whyte writes them another letter: "Would you allow me to remind you that 60 "days have elapsed since my proof was furnished you of "loss, under policy n° 65,971, transferred to me by H.-J. "Clarke, and to request a settlement. You can understand "that, as assignee, I am expected to be diligent, and that "creditors will look for an early distribution. I would, "therefore, feel obliged by a speedy liquidation of the claim. "Yours very respectfully, John Whyte, assignee." To that an answer was sent on the 31st of August: "Dear Sir, In "answer to your note of 24th inst., requesting a settlement of your claim as assignee of the estate [of] Davies, under policy n° 65,971, tranferred to you by H.-J. Clarke, we "have to inform you that the company consider that they "are not liable for any loss referred to in the claim you have "made under said policy, and decline paying it," There are two misdirections which, it is alleged, the judge made at the trial; first, that he told the jury that Clarke was the person who ought to have sent in an affidavit as to his interest under the policy, and how the loss occurred; and, secondly, that, though he left it to the jury to say whether there had been any waiver of strict compliance with the conditions, yet that he told the jury that the court could not see any evidence of such waiver; and it is said that there was

misdirection in those respects. To the first it was answered that direction is quite right; that Clarke was the proper person to make the affidavit, and even if that were wrong, still it was wholly immaterial, because it was plain that, even if Whyte were the person to make the claim and send in the affidavit, he had not sent in the proper proofs within the proper time. Now, with reference to the question whether Clarke was the proper person to make the claim and make the affidavit, it is necessary to consider what the position of Clarke was with reference to Davies. Davies was a man apparently of no means, but he had entered into a contract for the purchase of this property, for the purpose of establishing some glass works. A few days after he had purchased it, he executed a deed which unquestionably on the face of it was an absolute conveyance, in which, in consideration of the sum of $10,000, he purported to convey the property absolutely to Clarke. On the same day, there was what on the face of it was a mortgage from Davies to Clarke's wife, which appears to have been executed with Clarke's consent. Then, afterwards, in the month of October, there was an absolute assignment of the plant and machinery on the premises by Davies to Clarke in consideration of another sum with an agreement that it would be resold on paying the sum of $10,000. After Davies' failure, Clarke appears to have executed an assignment, with the consent of the company, of the policy to Whyte, by which he purported to assign it to Whyte; and previous to that assignment, or cotemporaneous with it (for it does not very clearly appear which), he wrote a letter of the 19th April, 1870, to Whyte, in which he says: "Sir, as "you are aware, I hold policies of insurance on the building, "plant, tools, &c., of the Dominion Glass Works, covering, to "a certain extent, my mortgage on the buildings, &c., and "also on the plant, tools, &c., mine by bill of sale. Now that "the concern has broken down, I think it right that the "policies in question should be transferred to you, as assignee "to the estate; for this reason I desire that, in case of "accident, all the unsecured creditors should share alike, and "indeed it is my intention, no matter what may be the result "of Davies' efforts to obtain a settlement with his creditors, "to cast aside all advantages in my favour as far as secu-"rities are concerned, and to take my chance as an "ordinary creditor, as I am well aware that many of the cre-"ditors were encouraged to trust Davies because of their "being told that I had a large amount invested in it. I want "them and you to understand that I can better afford to be "looked upon as a fool in business matters, than to be viewed "by my fellow sufferers as a selfish speculator, who, secured

" himself, induced or encouraged them to risk their money or " goods without security. I will, therefore, as soon as you are " ready to accept the same, transfer to you all the insurance " which I hold, for the benefit of the unsecured creditors of " the estate, not including claims for Davies' debts outside of " his glass business. *It must be perfectly understood that the " insurance in question is transferred for the benefit of the " unsecured creditors, and more specially for the benefit of " the Messrs Shaw, W.-P. Bartley and Co., Mathieu De " Beaufort, McMann, McCready, Abjon, Devany and Co., " Johnston, Robinson, Brogan, Harvey, Hill, Hynes, Hall, " Watkins, Guy and Co., Jordan and Benard, Smith and " McLynn, and myself.* I wish it to be distinctly understood " that I do not intend, nor will I consent, that any part or " portion of the insurance thus to be transferred shall be " taken as covering or in any way whatever securing *Molson's " claim*, or certain pretended mortgages and other *claims of " Mulholland and Baker*, nor those of certain workmen " claiming wages, because Mulholland and Baker received all " the glass that was ever manufactured by Davies up to the " saturday when they refused to pay the workmen's wages, " which they were bound to do, and, to my own knowledge, " with the exception of the amount due (to) them by that " last pay list, the whole of the men were far overpaid for all " the time they worked for Davies. *The above express condi- " tions and stipulations understood and agreed to, I will " transfer the insurance in question to you, as official as- " signee in the matter of Richard Davies (Clarke and Co.) " for the benefit of the creditors above mentioned*, whenever " you are ready to accept such transfer, and *I shall consider " your acceptance of the transfer as being an acceptance of " the conditions and stipulations above set forth, without ex- " ception.*" It is quite plain that, if that letter is the letter which states the terms on which Clarke assigned the policy to Whyte, it was not assigned to him for the equal benefit of all the creditors of Davies, but was assigned to him for the benefit of Clarke himself and certain particular creditors. It is true that a question was asked the jury: " Was the assign- " ment of the policy from Henry-J. Clarke to the Plaintiff exe- " cuted as alleged in plaintiff's declaration, and acceded to and " approved by defendants as therein also averred, or was the " said transfer made to plaintiff for the benefit only of the " parties mentioned in defendants' first plea and in a letter " bearing date the 19th day of April, 1870, and was said letter " written by Henry-J. Clarke to plaintiff and received by the " latter ? " The answer is: " Policy was assigned as alleged and " approved by defendants, and was for the benefit of the cre-

" ditors generally, Clarke's letter as to distribution having no " binding effect on assignee." It is to be observed the jury do not find that the letter was not written and sent, but all they find is that Clarke's letter as to distribution had no binding effect on the assignee. It appears to their lordships that this is merely an answer as to what is really a question of law. Whatever answer the jury gave on questions of fact which are put to them, the court would be bound by, subject, of course, to this: that, if the answer was not satisfactory, the court might order a new trial. But it appears to their Lordships that, if the jury in answering a question, really only give an answer which is an answer to a question of law, and not an answer to a question of fact at all, the court in giving their judgment and entering the verdict according to the findings of the jury, are to decide the question according to the correct decision in point of law, and not according to any erroneous statement or findings of the jury in that respect. Therefore, it appears to their Lordships, notwithstanding that finding, this really was an assignment by Clarke to Whyte, on trust for the benefit of Clarke himself and the other particular creditors mentioned in that letter. There is a considerable question, whether Clarke is to be treated as mortgagee or as the actual owner under the bill of sale which he took. It appears to their Lordships unnecessary to decide that question, because, whether he was owner or whether he was mortgagee, he was unquestionably the absolute owner of the policy of insurance. It is not contended that the policy of insurance was made on account of Davies, or that Davies had any interest in it. Neither was there any consideration given by Whyte for the assignment of the policy by Clarke to Whyte, and it therefore follows that this being in the nature merely of a gift, Clarke was perfectly entitled to say for what purpose and on trust for whom Whyte should hold the policy. Therefore, their Lordships are of opinion that Whyte held the policy on trust for the persons mentioned in the letter by Clarke. That being so, it necessarily follows that the case comes within the condition of the policy: " In case this policy " should be assigned in trust or as collateral security, when " loss or damage arises it shall be the duty of the assignor to " make and furnish the necessary proofs in support of the " claim before the same shall be recognized and payable." Therefore, the judge, in their Lordships' opinion, was perfectly correct in saying that Clarke was the person to send in the proof. The only other question is, assuming that the condition was not at all complied with, was there a waiver of the condition? The alleged waiver must arise either from the company having sent no answer to the letter of the 5th of

August, 1870, or else from the letter written by the company of the 31st of August 1870. With respect to not answering the letter of the 5th of August, 1870, that letter was not sent, nor were the proofs even by Whyte sent in until after the 30 days had elapsed; and their Lordships are clearly of opinion that the 30 days are a material part of the condition; so that, unless there is a waiver, the assured cannot recover unless he sends in the proper proofs within 30 days. It was said that, although it was a condition precedent that the proofs should be sent in, yet the period of 30 days was not material; but if that were so, then there would be no time appointed at all within which the proofs were to be sent in, and the assured might wait one, two, or three, or four years, before he sent in his proof, and still be entitled to recover, which would appear to be entirely contrary to the true meaning of the condition. And indeed the cases which have been referred to which have been decided in England, the case of *Meeson* vs *Hardy* and another case in 1 Ellis and Ellis, are decisions by the courts here that the time mentioned is an essential part of a condition of this kind, and that is affirmed by the clause which has been cited from the Code of Lower Canada, by which, if by some impossibility the assured is prevented from sending in his proofs within the proper time, further time may be given to him. Therefore, their Lordships think that it was essential that the proofs should be sent in within 30 days, unless that was waived. That being so, their Lordships are also of opinion that the not answering a letter sending in proofs after the 30 days, the mere fact of not answering that letter cannot possibly be a waiver of the not sending the proper proofs in, and not sending them in within proper time. Whether, if the proofs, or what appear to be and professed to be proofs, had been sent in within 30 days, asking, as this letter does, whether those proofs were satisfactory, whether in that case the not answering it, when, if they had answered it, possibly the assured might have sent in proper proofs in time, would be a waiver, it is not necessary to consider, but it appears to their Lordships that, after the 30 days are over, and when the assured had a defence to the action, their not answering a letter cannot be sufficient to amount to a waiver. Their Lordships do not mean to say that there may not be a waiver after the 30 days are over. It is possible that, if they did anything which misled the assured, or put him to expense, there might be a waiver after the time was over; but they are clearly of opinion that not answering this letter sent after the 30 days cannot of itself be sufficient. Then, with respect to the letter of 31st of August, that was in answer to a letter of the 24th of August, in which Whyte says not only the 30 days have

elapsed, but " would you allow me to remind you that 60 days have elapsed since proof was furnished." Therefore, that was when more than 90 days had elapsed, and when the assured was alleging that he had performed all the conditions, and was entitled to recover, and when the time had long gone by. Then, in answer to that, the assurers say: " We have to inform you that the company consider that they are not liable for any loss referred to in the claim you have made under said policy, and decline paying it." If that letter also had been sent within the 30 days before the time had elapsed, or had been sent after the 30 days had been waived, and had been sent at a time when it was still possible for the assured to have sent in proper proofs, then it might well be said that the company, by saying they are not liable for the loss, are not relying on the non-compliance with the sending in the proper proofs, but are relying on some defence on the merits respecting the fire itself. But when the time for sendind in the proofs has elapsed, merely writing to say they are not liable for the loss cannot in their Lordships' opinion amount to any waiver, because it is perfectly consistent with that that the company are going to say that they are not liable for the loss referred to, because the proper time for sending in the proofs has elapsed and the proofs have not been sent in. Therefore, their Lordships are of opinion that the direction of the judge was perfectly right on that part of the case, and that the verdict of the jury was right, and that the decision of the court was correct; and, therefore, they will humbly advise Her Majesty that the appeal be dismissed with costs. (22 *J.*, p. 215, et 7 *R. L.*, p. 106)

ATTORNEY AD LITEM.

SUPERIOR COURT, Montreal, 30th September, 1870.

Coram TORRANCE, J.

CASTONGUAY *vs* PERRIN *et al.*

Held: That, where parties settle a case out of court, after plea fyled, by a *compromis*, it is not competent to the plaintiff's attorney who asked for distraction of costs, to proceed to judgment in his favour for costs on the ground that the *compromis* has been made out of court in order to deprive him of his costs.

The action of plaintiff was for an alimentary pension and directed against children, and the declaration ask for distraction of costs in favour of the attorney. The defendants pleaded

to the merits, and, a few days afterwards, made an arrange- with plaintiff by which the action was settled. Subsequently, one of the defendants made a motion in court praying *acte* of the production by him of the deed of arrangement, and that the parties be sent out of court. The court granted *acte* on the 30th April last. Notwithstanding this, the attorney of plaintiff proceeded to made an *enquête* for plaintiff, and examined defendants *sur faits et articles.*

GAGNON, for plaintiff, cited *Stigny* vs *Stigny*, 2 Rev. de Leg. 120, and *suprà*, p. 181 ; *Peltier* vs *Landry*, *ibidem* ; *Richards* vs *Ritchie* (1); *Hébert* vs *La Fabrique* (2) ; *McCulloch* vs *Hatfield* (3); *Gauthier* vs *Lemieux*, 2 *L. C. R.*, p. 273,

(1) Lorsqu'est intervenu entre les parties au procès un accommodement qui a pour effet de priver frauduleusement le procureur du demandeur de ses frais, le tribunal déboutera le demandeur de son action et condamnera le défendeur en tous les dépens. (*Richards* vs *Ritchie et al.*, C. S., Québec, 5 mars 1856, STUART, J., GAUTHIER, J., et TASCHEREAU, J., 6 D. T. B. C., p. 98, et 5 R. J. R. Q., p. 29)

(2) Un accommodement étant intervenu entre les parties au procès, le défendeur se chargeant de payer les frais de l'action avant son rapport, le demandeur ne peut ensuite, à moins d'une convention spéciale, rapporter l'action pour recouvrer lesdits frais que le défendeur aurait négligé de payer, cet accommodement ayant eu l'effet de mettre fin à la demande du demandeur et ayant réduit son recours à la seule demande des frais lorsqu'ils auront été taxés. La demande pour distraction de dépens, faite par les conclusions de la déclaration, n'enlève pas au demandeur le droit de prendre, relativement à son action, tout arrangement honnête et qui n'a pas l'effet de priver les avocats de leurs justes honoraires. En loi, aucune distraction de dépens n'existe ni ne peut avoir lieu, sans avoir été accordée par un jugement de la cour. (*Hébert dit Lecompte* et *Fabrique de Saint-Jean*, C. B. R. en appel, Montréal, 17 septembre 1861, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J., MEREDITH, J., et MONDELET, J., confirmant le jugement de C. S., 4 février 1861, TASCHEREAU, J., 13 D. T. B. C., p. 66, et 11 R. J. R. Q., p. 264)

(3) Une saisie revendication peut être pratiquée contre le maître d'un navire sur son refus de signer le connaissement contenant l'état des marchandises chargées sur son vaisseau, et l'action être rapportée pour les dépens seulement, le connaissement ayant été signé après l'émission du bref, mais avant son exécution. Bien que les dépens ne fassent pas partie de la cause première de l'action, ils constituent néanmoins une partie de la demande, et, pour ce motif, le demandeur a autant de droit d'avoir jugement sur cette partie de sa demande que sur la première. (*McCulloch et al.* et *Hatfield*, C. B. R. en appel, Québec, 15 juin 1863, AYLWIN, J., dissident, DUVAL, J., MEREDITH, J., et BERTHELOT, J., infirmant le jugement de C. S., Québec, 5 décembre 1862, STUART, J., qui avait jugé que la signature du connaissement, avant l'exécution de la saisie-revendication, ayant fait disparaître la cause de l'action, le maître du navire ne pouvait être condamné aux dépens, 13 D. T. B. C., p. 321 ; 7 J., p. 229, et 11 R. J. R. Q., p. 351). Le juge AYLWIN était d'opinion de confirmer le jugement de la cour de première instance.

3 *R. J. R. Q.*, p. 179, et 11 *R. J. R. Q.*, p. 266; *Charlebois* vs *Coulombe*, 7 *L. C. J.*, p. 300, and *suprà*, p. 181; *O'Connell* vs *the Mayor et al. of Montreal* (4); Robertson's Dig., p. 114; *Darche* vs *Dubuc*, 1 *L. C. R.*, p. 238, 2 *R. J. R. Q.*, p. 470, et 11 *R. J. R. Q.*, pp. 265 et 359; Harrison's Dig, pp. 206, 7; *Cole* vs *Bennett*, and contended that he was entitled to a judgment for costs as the arrangement had been made to defeat him as to costs.

ARCHAMBAULT, for Côme Perrin, and H. PRÉVOST, for C. F. Perrin, *e contra* cited *Lafaille* vs *Lafaille* in Review, 14 *L. C. Jurist*, p. 262, and *suprà*, p. 180, and *Quebec Bank* vs *Paquet* (5).

PER CURIAM: The court applies the rule laid down in the *Quebec Bank* vs *Paquet*, 13 *L. C. J.*, p. 122, and turns the parties out of court, without costs. (14 *J.*, p. 304)

J.-C. GAGNON, for plaintiff.

JETTÉ and ARCHAMBAULT, for Côme Perrin.

H. PRÉVOST, for C. F. Perrin.

DE BELLEFEUILLE and TURGEON, for Madame Prévost.

LEASE.

COURT OF REVIEW, Montreal, 30th September, 1869.

Coram MONDELET, J., MACKAY, J., TORRANCE, J.

DORION *et al. vs* BALTZLEY.

Held: In the case of a lease, by one deed, of two separate premises, subject to the condition that the tenant should "not make over his "interest in the present lease, without the consent of the said lessors "being first obtained in writing for that purpose," that a sub-lease of one of such premises, without the written consent of the landlord, was legal and valid.

This was a hearing in review of a judgment, rendered in the Superior Court, at Montreal, on the 3rd day of June, 1869,

(4) Relativement à la dette ou à la matière qui fait l'objet du litige, les parties peuvent venir à l'accommodement qu'il leur plait, mais si l'accommodement concerne la procédure et qu'il soit intervenu entre les parties à l'insu de l'un des procureurs, il n'engage en rien le procureur qui n'en a pas eu connaissance. Le procureur est le maître du procès; c'est lui qui doit le diriger, et le client ne peut, par un arrangement étranger à son procureur, intervenir dans la conduite du litige. (*O'Connell* vs *Cité de Montréal*, C. S., Montréal, 31 octobre 1859, SMITH, J., 4 J., p. 56; 10 D. T. B. C. p. 19, et 8 R. J. R. Q., p. 95)

(5) Les parties à un procès peuvent transiger et y mettre fin sans le concours de leurs procureurs *ad litem*, et ces derniers n'ont pas le droit de continuer un procès parce qu'il est demandé distraction de frais; la transaction mettant fin au mandat des procureurs et entraînant nécessairement le désistement de la demande. Art. 1918 C. C., et arts. 450 et 482 C. P. C. (*Banque de Québec* vs *Paquet*, C.S.R., Montréal, 29 janvier 1869, MONDELET, J., BERTHELOT, J., et BEAUDRY, J. A., infirmant le jugement de C. S., Shefbrooke, 26 mai 1868, SHORT, J., 13 J., p. 122, et 19 R. J. R. Q., p. 168)

by Mr. Justice Mackay, dismissing plaintiff's action. The action was brought *en résiliation de bail*, on the ground that defendant had leased one portion of two separate premises leased to him by plaintiffs, in contravention of the conditions of the lease. The lease was for three years of the whole of the upper part of a two-story house on Notre-Dame street, belonging to plaintiffs, and for two years of a shop in the lower part of said house, and both premises were leased by one and the same deed of lease which provided that the lessee "shall not make over his interest in the present lease, without the consent of the said lessors being first obtained in writing for that purpose." The defendant sub-let the shop without such written consent. MACKAY, J., dismissed the action, on the ground that plaintiffs had "failed to prove that defendant hath violated "the lease set up and declared on in the declaration."

MONDELET, J.: The question here is whether a lessor, who has simply forbidden to sub-let and has not particularly forbidden to sub-let any part, can obtain the resiliation of the lease, when the lessee, without changing the nature or destination of the thing leased, sub-lets a room and reserves to himself or continues to occupy the rest. The question has been already several times decided. The judgment appealed from decided that defendant, under the circumstances, did not violate the clause of the lease. This judgment is correct and should be and is confirmed. (14 J., p. 305)

KELLY and DORION, for plaintiffs.

JOHN MONK, for defendant.

LEASE.—REPAIRS.

SUPERIOR COURT, Montreal, 30th November, 1869.

Coram MACKAY, J.

SPELMAN *vs* MULDOON.

Held: That a tenant has no right to make repairs to the leased property, unless he obtains the authority of the court (by action) to make the same at the expense of the lessor.

This was a hearing on law. The plaintiff sued defendant to recover (besides an amount claimed for damages) the sum of $500, as the cost of certain necessary repairs which he alleged he had been obliged to make to the leased premises. The defendant pleaded a *défense au fond en droit* to the demand of plaintiff for the $500, on the ground that it did not appear from the allegations of the declaration that any action had

ever been brought by plaintiff to compel defendant to make the repairs, or that defendant had ever been placed *en demeure* to do so.

PER CURIAM: According to article 1641 of our own code, plaintiff was bound to put defendant *en demeure*, by action, to make the repairs, and to have obtained the authority of court to do them, in case of default by the landlord. The demurrer must therefore be maintained, and plaintiff's action, so far as his claim for the $500 is concerned, dismissed, with costs. Demurrer to action maintained. (14 *J.*, p. 306)

WILLIAM H. KERR, for plaintiff.

DOHERTY and DOHERTY, for defendant.

TIERCE-OPPOSITION.

COURT OF REVIEW, Montreal, 30th October, 1869.

Coram MONDELET, J., BERTHELOT, J., TORRANCE, J.

MCDONALD *et vir vs* MCDONALD, *and* DODD, int. party, *and* MCDONALD *et al.*, tiers opposants.

Held: That the fact that one of the tiers opposants, (who claim as copartners) is a defendant in the cause, is no bar to their right to fyle their opposition.

MONDELET, J.: The judgment appealed from was rendered by the Superior Court, Montreal [BERTHELOT, J.], on the 28th April, 1868. By that judgment, the petition and *tierce-opposition* fyled by Edward McDonald *et al.* was dismissed. The object of the petition and *tierce-opposition* was that, in the judgment to be rendered in the cause, with reference to such *tierce-opposition*, the defendant should be condemned to pay to petitioners the sum of money therein mentioned awarded, by the judgment already rendered in said cause, to the intervening party, or that intervening party should pay the sum to petitioners. There are no reasons assigned in the judgment appealed from for the dismissal of the petition, but the learned counsel for the petitioners, appellants, stated at the hearing that the Honourable Judge who pronounced the judgment was understood to say that, because one of the petitioners appeared also to be a defendant in the cause, and was consequently already a party thereto, the petitioners did not come within art. 510 of the Code of Civil Procedure. It seems to me that there is nothing on the face of the pleadings, nor in the evidence, to justify the assumption that the Edward McDonald, who is a defendant, is the same as the Edward Mc-

Donald, one of the petitioners. Morally, I believe them to be the same, but there is no legal evidence of it in the record. But, admitting them to be the same, that would not deprive Edward McDonald of the right of fyling the petition and *tierce-opposition* in question, because the said McDonald was a member of a firm composed of others besides said McDonald. This firm cannot be presumed to have been a party to the cause, nor can the defendant, who has appeared in his own individual or personal interest, be legally held to be a party to the cause as representing said firm. It is, in my opinion, sufficient for a petitioner, under the present circumstances, to be admitted an intervening party, to show an apparent *prima facie* interest. That requisite is shown on the face of the petition. It will be time enough when the merits of the case come to be investigated to deal therewith. I am of opinion that the judgment dismissing the petition should be reversed, and the petitioner permitted to intervene. The judgment under review was accordingly reversed, and the *tierce-opposition* ordered to be received and form part of the cause. (14 *J.*, p. 307)

DORION and DORION, for plaintiffs.

S. BETHUNE, Q. C., for tiers opposants.

INTEREST IN SUIT.

COURT OF QUEEN'S BENCH, Montreal, 8th September, 1870.

Coram DUVAL, C. J., CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

ROBERT WATSON, *ès-qualité*, petitioner and defendant *par reprise d'instance* in the court below, appellant, *and* THE CITY OF GLASGOW BANK, plaintiff in the court below, respondents.

Held: That the right to petition to quash a writ of attachment in compulsory liquidation under the Insolvent Act of 1864 is purely personal to the debtor, and cannot be exercised by a person to whom he has made a voluntary assignment. (Act of 1864, 27-28 Vict., ch. 17, sec. 3, § 12; Act of 1869, 32-33 Vict., ch. 16, sec. 26)

E. CARTER, Q. C., for appellant: On the 26th October 1868, an affidavit was made by Richard B. Angus, as the agent of the City of Glasgow Bank, under the provisions of the Insolvent Act of 1864, in which defendants were described as "James Arbuckle, of the City of Glasgow, in Scotland, and "James Bruce, of the city and district of Montreal, merchants "and co-partners, trading at Montreal, under the style and

" firm of " Arbuckle and Bruce." This affidavit was sworn to before the prothonotary, at Montreal, and, thereupon, a writ of attachment in compulsory liquidation was issued, and property belonging to James Bruce alone was attached. On the same day, James Bruce, who had been, for some time previous, carrying on business alone, under the style of James Bruce & Company, made a voluntary assignment to Robert Watson, in pursuance of a resolution passed at a meeting of his creditors previously held, at which meeting the City of Glasgow Bank, by their attorney, were present. The contest is between Robert Watson, the assignee of James Bruce, whose petition to be permitted to intervene to contest the writ of attachment was allowed and fyled, and respondents, plaintiffs upon the writ of attachment. The petition in intervention set forth: " That James Bruce carried on business alone, and was seized " and possessed of the goods, property and effects attached, " and that, by virtue of the assignment made in favour of " (Robert Watson), under the provisions of the Insolvent Act " of 1864, before William Ross, notary public, on the 26th day " of October, 1868, the aforesaid property and effects became " vested in your petitioner as assignee, and, by reason thereof, " your petitioner hath an interest in contesting the proceed- " ings had and taken by plaintiffs, and the right to intervene " for all legal purposes whatsoever connected with the defence, " inasmuch as no such firm as that of 'Arbuckle and Bruce' " was in existence at the time of the issuing of the writ of " attachment; and the attachment has been illegally issued, " for the purpose of preventing your petitioner, as such " assignee, from obtaining possession of the estate of Bruce." After the return of the writ of attachment and within the delays prescribed by the Insolvent Act, appellant, as the assignee of James Bruce, contested the writ, and, by his petition to set aside and quash the same, set forth: " That the " affidavit, upon which the writ of attachment was issued, is " illegal and null, inasmuch as the same was sworn to before " the joint prothonotary, who have no authority to administer " an oath in matters relating to insolvency; that, at the time " the said writ was issued, Bruce was not carrying on busi- " ness with Arbuckle, as is therein set forth, but was carry- " ing on business alone; that plaintiffs were fully aware, at " the time the process of attachment was issued, that the part- " nership heretofore existing between Arbuckle and Bruce " had been then dissolved in the month of March last, and, " further, plaintiffs were fully aware that Arbuckle had, long " since and during the said partnership, become a bankrupt in " Scotland, and that, thence, after Bruce was carrying on busi- " ness alone, under the style of James Bruce and Company;

" that the property attached was and is the property of Bruce, " and was not the property of any co-partnership of Arbuckle " and Bruce." The respondents, on the 18th November, 1868, fyled an answer in law, as also an answer in the nature of a *défense au fond en fait.* The answer in law, upon which the judgments appealed from were rendered, is as follows: " And " plaintiffs, for answer in law to the peittions of Watson, *ès-qua-* " *lité*, respectively presented to Mr Justice Mackay, on the 9th " and 16th days of November instant, in Chambers, saith, that " the said petitions are irregular and illegal, and that the alle- " gations are insufficient in law to enable petitioner to have the " conclusions thereof, for the following reasons, to wit: 1. Be- " cause the proceeding adopted by petitioner is not known to " the law, and he has no right, by summary petition, to ask " for the delivery of any of the goods attached, and the court " and the judge in vacation has no jurisdiction to award the " conclusions of the said petitions; 2. Because petitioner does " not represent the insolvents, and the insolvents have not " presented any petition to set aside the attachment, or to stay " proceedings, as provided by law; 3. Because the only inter- " est that petitioner, who is a stranger to the proceedings of " plaintiffs, has to urge any of the matters alleged by him in " his said petitions, is to obtain possession of certain goods " claimed by petitioner to belong to him, in his said quality, " a remedy which he cannot, by law, have upon the summary " petition. 4. Because the only ground upon which a petition " could, by law, be presented, under the circumstances, would " be that the estate of the insolvent had not become subject " to compulsory liquidation, which is not alleged by peti- " tioner." Paragraph 13 of sec. 3 of the Insolvent Act of 1864, 27-28 Vict., ch. 17, enacts: " Immediately upon the expira- " tion of five days from the return day of the writ, if no peti- " tion to quash or to stay proceedings be fyled, or upon the " rendering of judgment on the petition to quash, if it be dis- " missed, the judge upon the application of the plaintiff, or " of any creditor intervening for the prosecution of the cause, " shall order a meeting of the creditors to be held before him " or any other judge, at a time and place named in such order, " and after due notice thereof, for the purpose of giving their " advice upon the appointment of an official assignee."

The judgment rendered by Mr Justice MACKAY, on this law issue, confirmed by the majority of the Judges in Review, (Mr Justice MACKAY being one of the three Judges sitting in Review) is as follow: "Considering the nature of the debt claim of plain- " tiff, as set forth in the affidavit for attachment, and that it is " a debt that originated against defendants, James Arbuckle " and James Bruce, before any alleged dissolution of their part-

" nership, and that, therefore, right was and is in plaintiff to " proceed against Arbuckle and Bruce, as plaintiff hath done. " Seeing that there is no nullity nor illegality in or about said " attachment, or in about the affidavit fyled by plaintiff, " which was well sworn to before the prothonotary, to wit, " under chapter 83, section 2, of the Consol. Stat. of L. C., " and art. 30, Code of Procedure. Seeing that, under said " attachment, all the property of James Arbuckle and James " Bruce, and of even James Bruce (belonging to him by any " name, even by such a name as James Bruce and Company), " might lawfully be seized, at suit of plaintiff, proper accounts " being, however, to be kept of the joint estate of said part- " nership of Arbuckle and Bruce, and also of the separate " estate of James Arbuckle and of James Bruce. Considering " that I, said judge, have no right to grant and, by law, can- " not grant the prayer of Watson's petitions, for the reasons " forth in them; I, do maintain the answer in law and do " reject said petitions, with costs."

The appellant submits that the judgment appealed from should be reversed. If the City of Glasgow Bank had issued their attachment in conformity with the facts as admitted by the answer in law, that attachment would have issued against Bruce alone, as heretofore co-partner with Arbuckle, and under the provisions of law amending the Insolvent Act of 1864, appellant, as the assignee of James Bruce, would have been entitled to claim that the property attached should be delivered over to him as such assignee. That provision is as follows: 29 Vic., cap. 18, sec. 10): " If, pending proceedings, for compulso- " ry liquidation, the insolvent should make a voluntary assign- " ment of his estate and effects, in conformity with the provi- " sions of the said Insolvent Act of 1864 and of this act, the " assignee under such assignment may apply for and obtain " from the judge an order to stay such proceedings, subject " to the claim of the plaintiff for payment, out of the estate, " of the costs incurred in such proceedings." The right of appellant, as the assignee of Bruce, to contest the affidavit and writ of attachment, cannot be denied, and, assuming that no assignment had been made by Bruce, he would have had the same right to contest the legality of the issue and service of the process of attachment, as any defendant in ordinary civil process could exercise. And, when it is considered that the objections raised were, that a firm was impleaded which did not exist, and that the property attached was not the property of the firm, but the private property of one of its members, who had assigned to appellant, it is difficult to understand upon what principle the court could set aside the objections raised on the demurrer or answer in law. The answer in

law being an admission of the facts pleaded by the petition, the judgment should have been in favor of the appellant.

RITCHIE, Q. C., for respondent: On the 26 th October, 1868, the City of Glasgow Bank, being so far as known to the bank, the only creditor of a firm of Arbuckle and Bruce, sued out a writ of attachment, under the Insolvent Act of 1864, having for its object the placing of the estate of the alleged insolvents in compulsory liquidation, and the appointment of an assignee to the same. The ground set forth in the affidavit for adopting this proceeding (in addition to the allegation of insolvency) was that Bruce, one of the insolvents, was about to assign and dispose of the assets of defendants, with intent to delay the creditors of defendants. The writ is in the usual form, and commands the sheriff to attach the estate of the insolvents, and to summon them to answer the plaint contained in the affidavit. It was returnable on the 11th November, following. The writ was duly executed by the sheriff, James Court, an official assignee, being made guardian of the estate, and was returned before the court. Before noticing the proceedings which took place in this matter, it may be well to review the provisions of the Insolvent Acts of 1864 and 1865 respecting compulsory liquidation, as they bear upon the questions in issue between the parties to the present appeal. In opposing an attachment, the alleged insolvents had a right: 1. To present, within five days from the return day of the writ, but not afterwards, a petition praying for the setting aside of the attachment made under the writ, on the ground that their estate had not become subject to compulsory liquidation. (Insolvent Act, 1864, ch. 17, sec. 3, §12) or 2nd, to petition the judge (instead of applying to quash the attachment) to suspend further proceedings, and to submit such petition to a meeting of creditors and the debtors, in order that the creditors might determine whether the proceedings should be suspended or not (§ 15). Upon the expiration of five days from the return day of the writ, no petition to quash or to stay proceedings being fyled, or the petition to quash, if fyled, being dismissed, a meeting the creditors would be ordered and an official assignee would be appointed (§§ 13 and 14). The insolvents did not adopt either of the foregoing remedies, the only ones open to them under the law, and did not even appear in answer to the writ. The law is express in declaring that the petition to quash, made by the insolvent, as provided in sec. 3, § 12, above cited, is the only mode by which proceedings for compulsory liquidation, commenced by attachment, can be set aside. The Insolvent Act Amendment of 1865, 29 Vict., c. 18, s. 7, provides that: "No declaration shall hereafter be required in proceedings

for compulsory liquidation, and such proceedings shall not be contested either as to form or upon the merits, otherwise than by summary petition, as provided by sub-section twelve of section three of the said Act," *i. e.* the Insolvent Act of 1864. Before the return day of the writ, that is, on the 29th day of October, 1868, Watson, who had procured an assignment to him of the individual estate of Bruce, presented a petition to Mr. Justice MACKAY, but, after hearing, withdrew it. On the 9th November following, appellant, in his quality of assignee of the estate of Bruce, presented another petition, alleging that, for nearly a year then past, Bruce had been carrying on business alone; that Bruce was seized and possessed of the goods, &c., seized and that, by virtue of the assignment to petitioner, by Bruce, such goods, &c., became vested in petitioner who had consequently an interest in contesting all proceedings taken by plaintiff and the right to intervene for all legal purposes connected with the defence, inasmuch as no such firm as that of Arbuckle and Bruce was in existence at the time of the issuing of the writ of attachment, which had illegally and irregularly issued for the purpose of preventing petitioner as such assignee from obtaining possession of the estate of Bruce. The conclusions are that petitioner in his capacity " be permitted to intervene for the purpose of contesting the attachment." The reception of this petition was resisted by plaintiff, but was " allowed to be filed, saving all rights *au fond* to all parties." The appellant, having thus obtained a foothold in a proceeding to which he was, by law, an entire stranger, filed another petition on the 16th November, 1868, in which he attacks the affidavit upon which the writ of attachment issued as not sworn to before the proper officer, reiterates the allegations of the previous petition as to Bruce having carried on business alone and being the proprietor of the goods, &c., seized, sets up the dissolution of the partnership and the alleged bankruptcy of Arbuckle, in Scotland, and concludes by asking that the writ of attachment be quashed, or, if not quashed, that all proceedings be stayed and the property eized delivered over to him as the assignee of Bruce. The plaintiff fyled an answer in law to these two petitions. The reasons given in support of this pleading are the following, viz: 1. Because the proceeding adopted by petitioner is not known to the law and he has no right, by summary petition, to ask for the delivery of say of the goods attached and the court, or a judge in vacation, has no jurisdiction to award the conclusions of the petitions or any of them; 2. because petitioner does not represent the insolvents and the insolvents have not presented any petition to set aside the attachment, or to stay proceedings, as provided by

law; 3. because the only interest that petitioner has to urge is to obtain possession of certain goods claimed by petitioner to belong to him in his quality, a remedy which he cannot by law have upon summary petition; 4. because the only ground upon which a petition could, by law, be presented in this matter, under the circumstances, would be that the estate of the insolvents had not become subject to compulsory liquidation, which is not alleged by petitioner. M. Justice MACKAY maintained the answer in law and dismissed the two petitions. An inscription was then fyled by petitioner for hearing of the matter before three judges in review. The judgment of Mr. Justice MACKAY was confirmed. The appellant, mistook his powers and privileges under the assignment made to him by Bruce. That assignment merely conveyed to appellant the individual estate of Bruce (Insolvent Act of 1864, ch. 17, sec. 2, §7). It gave him no right to interfere with an attachment having for its object the appointment of an assignee to the partnership estate which was not touched by the assignment of the individual estate, and it did not take away the right which the insolvents had to have the writ of attachment quashed, upon the ground that the partnership estate had not become subject to compulsory liquidation. The insolvents alone could attack the proceedings taken against them, and only upon the grounds stated. If the foregoing view is correct appellant was an intruder in proceedings which in no way concerned him. The object of these proceedings was the appointment of an assignee to the estate of Arbuckle and Bruce. Such appointment the creditors had a right to have made, unless the debtors themselves should allege and prove, in the manner pointed out by the law, that their estate was not subject to compulsory liquidation. Even, if no property whatever had been attached under the writ, the right to have an assignee named would remain intact, and it is a hardship that the proceedings of respondent to have an assignee named to an estate of which the bank is the principal, if not the only creditor, have been so long delayed by obstructions interposed by a stranger. Even, if appellant could claim goods alleged by him to belong to an estate of which he was assignee, upon summary petition (a proposition by no means admitted), his application was premature, for the simple reason that, until the appointment of an assignee to the partnership estate, there was no one to represent the latter estate, or to act in the interests of its creditors. The appellant, therefore, having no standing in the court below, and his petitions being irregular and illegal, the question of the truth or falsity of the facts set up by him is immaterial. He had no right to present the petitions at all

and the only error committed by the Honorable Judge in the court below was in allowing the petitions to be fyled. The appellant sought a remedy which the law did not give him, and his first attempt to enforce it ought to have been refused. As to the regularity of the oath to the affidavit upon which the attachment was based (an objection which, under the views above enunciated, could not be urged by appellant), it is only necessary to refer to article 30 of the Code of Civil Procedure, which provides that the oath required by law, in any proceedings before the court, may be taken before the prothonotary.

BADGLEY, J.: The bank, Scotch creditors of Arbuckle and Bruce, trading in co-partnership at Montreal, under the firm of Arbuckle and Bruce, caused to be issued, upon the required affidavit therefor, the insolvent writ of attachment for compulsory liquidation in insolvency against these parties. The writ was duly executed, and the property in the hands of Bruce was arrested and attached, as provided by law, and taken into possession by James Court, an official assignee. After this had been effected, Bruce individually, and in his own name, made a voluntary assignment in insolvency into the hands of appellant, another official assignee in Montreal, who filed an intervention before a judge sitting in insolvency, claiming to be put into sole possession of the attached effects, upon the ground that the co-partnership alleged in the affidavit had ceased to exist before the issue of the writ, and that the effects were the property of Bruce alone, who was and had been for several months a sole trader. The intervention was demurred to upon the ground chiefly, that the insolvent trader alone could object to the validity of the writ, and that not having availed himself of the privilege offered to him by the insolvent law, appellant, as his individual voluntary assignee, could not interfere with the writ or remove the arrestment, and that, therefore, the intervention was against law, and the writ remained in full force and effect. Now, the insolvent law allows the adoption of insolvent proceedings against a trading co-partnership, as well as against an individual trader, and necessarily arrests in its course all the property and effects of each partner as well as that of the co-partnership. The proceeding against the partnership of course included the individual partners and each as an individual trader, and the law provides, in substance, that, so long as the original writ holds good no subsequent individual proceeding shall avail. But, insolvents are allowed personally to petition to quash the compulsory proceedings, and, necessarily, a partner would have that right also, but it is a purely personal one and cannot be delegated to another, and certainly

not to a subsequently appointed assignee voluntarily chosen by the particular insolvent partner himself. The law points out the duties and rights of assignees, but gives them no power to petition to quash a previously issued writ of attachment. If the insolvents themselves, or either of them, do not petition to quash, in the manner and within the time strictly limited by the Insolvent Acts, the writ necessarily stands good against them or him. Any subsequent action by either in the shape of a voluntary assignment cannot avail to stop the force and effect of the issued writ, which, by the insolvent's failure to petition to quash, is rendered absolutely effective. The estate and effects have thus become validly held under the writ and cannot be divested from it, except by proceedings provided by law. The petition in intervention of appellant, the alleged assignee of the individual partner, one of the insolvent firm, cannot affect the writ and, therefore, his appeal must be dismissed and the judgment below confirmed. (14 *J.*, p. 309)

CARTER and HATTON, for appellant.

RITCHIE, MORRIS and ROSE, for respondent.

SALE.—DELIVERY.

COURT OF QUEEN'S BENCH, Montreal, 8th September, 1870.

Coram DUVAL, C. J., CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

THOMAS RIMMER *et al.*, appellants, *and* THOMAS RUSTON, respondent.

Held: That, when A sells to B 400 barrels of coal oil, for a price payable in a specified time from date of return of the gauge of the oil, and B accepts a certificate of gauge of 352 full barrels (the gauged contents of 400 barrels), and an invoice from A, for 352 barrels only, without protest or objection, and promises to pay the amount of such invoice, he cannot afterwards repudiate the transaction and insist on a delivery to him of 400 barrels of coal oil.

BETHUNE, Q. C., for appellants: This is an appeal from a judgment of the Superior Court, at Montreal, sitting in Review, rendered 22nd May, 1869, confirming a judgment rendered by Mr. Justice MONDELET, in the Superior Court, on the 30th December, 1868, condemning appellants to pay to respondent the sum of $400 with interest from 10th September, 1867, and costs of suit. On the 8th July, 1867, defendants sold plaintiff 400 barrels of coal oil, "Victoria brand," at 17 cents per gallon, of which $1 per barrel was agreed to be

deposited by plaintiffs, and the balance was to be paid for "*in fifteen days from date of return of Campbell's gauge.*" The defendants caused the 400 barrels to be gauged, and, as "some of the barrels" were "*partially empty* and others *altogether so*" (as testified by Campbell's assistant gauger), 352 full barrels were made out of the whole lot. The certificate of gauge is fyled *by the plaintiff* and was handed to him on the 25th of July, 1867, when he wrote thereon in pencil, "Received 25th July." "Due 9th August." This certificate was so handed to plaintiff by Stephen B. Heward, the broker who negotiated the sale between plaintiff and defendants and Heward attests that "plaintiff looked at it and placed it on the desk in his office, and said, *that the account would be paid when it was due.*" Heward further swears that plaintiff *did not, then or at any time afterwards, object* that the certificate had reference *only* to 352 barrels. When the certificate of gauge was so delivered, the invoice was *also* handed to plaintiff by Heward, and the date of its reception is also recorded thereon, "Received 25th July." This invoice corresponds, as regards number of barrels and their contents in gallons to the certificate of gauge. Heward swears that plaintiff again made *no objection* to the fact that the invoice only referred to 352 barrels of the oil, instead of 400, "*but, on the contrary, promised to pay the amount of the invoice when due.*" Heward adds that he called again on plaintiff, after the invoice became due, for payment of it, but "*could get nothing from him but promises.*" He says he then wrote and delivered to plaintiff, a letter, threatening proceedings by defendants, and that, *after* sending that letter to plaintiff, he "saw him and he told " witness, *that the account would be settled.*" Heward also attests, that it was only *after* the occurence of what he last swore to, that plaintiff, *for the first time*, said that "he wanted the whole 400 barrels." The defendants, subsequently, re-sold the oil, plaintiff *retaining the certificate of gauge* (which by the terms of the contract was equivalent to delivery of the oil sold) and the *invoice* of the sale, as of 352 full barrels. The plaintiff then sued defendants to recover back his $400, which he had paid as deposit, and for damages for alleged breach of contract. Defendants pleaded as follows: that true it is, they agreed, on the eighth day of July last, at Montreal, to sell and deliver to plaintiff 400 barrels of coal oil, "Victoria" brand, at seventeen cents per gallon, one dollar per barrel to be deposited cash, balance to be paid by plaintiff in cash, in fifteen days from date of return of Campbell's gauge, and that plaintiff deposited with defendants the sum of $400, in accordance with the contract, but defendants say that, owing to the subtle and volatile character of coal

oil, it was and is matter of notoriety in the trade, and was and is well known to plaintiff, that it is impossible to keep the barrels containing the oil full for any considerable time; "and defendants say that, according to the usages and custom of trade, when any given number of barrels of coal oil are sold, it is perfectly understood that the barrels are not considered or held to be full, and that the sale in consequence is made at so much the gallon, and the oil paid for according to the result of the actual gauging of the contents of the barrels; that the sale above admitted as having been made to plaintiff, was made in accordance with the usage and custom of trade, and with a full knowledge and understanding on the part of plaintiff, that the said 400 barrels were not in fact full of coal oil, and were not, for the purposes of such sale, to be considered or held to be full of oil; that, when the sale was so made defendants had in store, in Middleton's Coal Oil Stores, near Montreal, (as the said plaintiff well knew), four hundred barrels of coal oil of the brand and description aforesaid, and, before proceeding to have the same gauged by Campbell, the gauger above named, defendants applied to plaintiff to ascertain from him whether he preferred to have the 400 barrels gauged, according to their actual contents, and delivered to him in their then actual condition, or whether he preferred that the full barrels should be made out of the 400 barrels gauged, and plaintiff, then and there consented and agreed that full barrels should be made out of the contents of the 400 barrels, and the contents of such full barrels gauged, and to receive such full barrels as a compliance on the part of defendants with the aforesaid contract; that the invariable usage and custom of the trade in Montreal has been and is, when any lot of coal oil is to be gauged and any of the barrels composing the lot are partially empty, to make full barrels out of the whole lot before gauging the lot; that, out of the contents of the 400 barrels, 352 full barrels were made and were gauged by Campbell and ascertained to contain 13,870½ gallons of oil; that plaintiff received the gauge without objection or protest of any kind, and hath retained the same ever since in his possession, but notwithstanding the premises, he did not, within fifteen days from the delivery of the gauge, pay to defendants the balance of the purchase money, after deduction of the amount of $400; that, on the said 23rd day of July last, defendants did furnish to plaintiff the account fyled in this cause, which plaintiff also received and retained in his possession, without objection or protest of any kind; that payment of said account was repeatedly demanded of plaintiff, and that, more especially, on the twelfth day of August last, when plaintiff faith-

fully promised to pay the amount by three o'clock in the afternoon of the said twelfth day of August last; that, notwithstanding the premises, plaintiff still failed to pay the amount of said account, and, thereupon, defendants, on the thirteenth day of August last, through the ministry of T. Doucet, notary public, formally demanded payment of the aforesaid balance, and did notify him that unless he paid the said balance, and removed the said oil within twenty-four hours, defendants would sell the oil, for such price as they might get for the same, at public auction, and hold him responsible for, and claim and recover from him all loss that they might sustain by difference in price, and all other losses, expenses, injury and interest then already suffered and to be suffered in the premises; that plaintiff, notwithstanding the premises, still neglected to remove the oil and pay for the same, in terms of said contract, and, in consequence of various rumours which prevailed in the city that the stores of Middleton would be destroyed by fire, defendants sold the oil through a broker for an amount equivalent in net cash (after deducting the broker's commission) to $2,133.27; and that the price so realized was greater than could or would have been realized had the oil been sold by public auction, and was the full market value of the oil at that time; that, by reason of the neglect of plaintiff to remove the oil and to pay for the same defendants incurred, in consulting counsel, in notarial charges, in storage and in the gauging of said oil, costs and expenses to the extent of $30.74 which defendants, have a right to deduct from the net proceeds of said sale and from the deposit of $400; that the price of the oil so sold to plaintiff amounted in the aggregate to $2,357.98, and, after deduction therefrom of the net proceeds of the said sale so made subsequently by defendants and of the deposit of $400, less the said sum of $30.74, there remains a balance of $146.77, due to plaintiff as cash, on the twenty-second of August last; that defendants have been, at all times, ready and willing to pay the said amount last mentioned to plaintiff, with interest thereon since the twenty-second day of August last, but he has, at all times, refused to accept the same; that the interest on the said sum of $146.77, accrued to this day, and the costs to date, as in an action for the recovery of such an amount, form, with the said demand itself, the sum of $170.84, which defendants herewith deposit and consign to the hands of the prothonotary, to the end that plaintiff may accept the same, if he think fit to do so." The usage and custom of trade invoked by the plea, and its knowledge by respondent, were abundantly established in evidence, and, although appellants did not prove that they actually applied for and obtained res-

pondent's consent to make full barrels of the lot of 400, yet respondent's action, on receiving the certificate of gauge and invoice clearly proved, that he understood the matter, and consented to receive 352 full barrels, as the representative or equivalent of what he actually purchased.

The following was the judgment rendered by Mr Justice MONDELET:

" The court, considering that plaintiff hath proved the material allegations of his declaration, namely, that on the eighth day of July, 1867, at the city of Montreal, defendants sold to plaintiff 400 barrels of coal oil, " Victoria " brand, at seventeen cents per gallon, one dollar per barrel to be deposited, and the balance to be paid in cash fifteen days from date from return of Campbell's gauge; considering that plaintiff hath performed his part of the contract which he was bound to; considering that defendants have failed to deliver, as thereto bound and obliged, the said quantity of 400 barrels of coal oil, or any part thereof; considering that plaintiff hath a right to recover from defendants the said sum of $400; it is ordered and adjudged that defendants do pay and satisfy to plaintiff the sum of $400, with interest thereon, from the tenth day of September, 1867, the day of service of this action, with costs. Out of which sum of $400 the sum of $170.84, amount of defendants' tender, shall be deducted, plaintiff having received the same."

And the following was the judgment in review, (Justices MONDELET, BERTHELOT and BEAUDRY): "The court, considering that there is no error in the said judgment, doth, in all things, confirm the said judgment, with costs."

Appellants submit: 1. That, under all the circumstances of the case, the delivery by defendants of the *gauged contents* of the 400 barrels sold was a virtual compliance with the terms of the contract; 2. that, under any circumstances, the acceptance by plaintiff of the certificate of gauge and of the invoice, *with out objection or protest, and his retention of the same coupled with his repeated promises to pay* amount in law to a waiver of any right he might otherwise pretend to have to exact delivery of 400 full barrels of oil, instead of their mere gauged contents; 3. that defendants, having proved the allegations of their plea, were and are entitled to a judgment in their favor, according to the conclusions of such plea.

ROBERTSON, Q. C., for respondent: It will be seen that the usage pleaded in the original plea is " that is understood the barrels are not considered or held to be full;" in other words, that defendants were, by this usage, bound to deliver the 400 barrels with their contents, be the contents more or less. The

usage set up in the *amended* plea is that the barrels are always filled up before gauging; this means that the purchaser gets so many full barrels, as may happen to be obtainable, filled up out of the number of barrels mentioned in the contract, and that, in this case, plaintiff only can obtain 352 barrels out of the 400 mentioned in the contract. The former usage is far less repugnant to principle than the *latter*. It, in effect, says: "I sold you *a specific lot of oil*, according to the usage of trade, 400 barrels, in Middleton's sheds or elsewhere. Take the 400 barrels, and pay me at the contract price per gallon and on the actual contents." This gives the purchaser 400 barrels as they were, and their contents, more or less. But defendants *did not deliver or offer the* 400 *barrels* according to the pretended usage first pleaded. This usage, even if proved, cannot avail to discharge appellants from their written contracts, even if they could tender legally 400 barrels, more or less, empty; nor was the sale of the oil, by the sale notes, a sale of a *specific lot* in a fixed place. It was not limited to a lot pointed out, and known and seen by both parties. The defendants had a right to go into the market and buy oil of the 'Victoria brand" and tender it to plaintiff. They were not limited to the delivery of a special lot, nor could respondent refuse oil of the brand and quality mentioned in the contract, nor insist upon the oil said to be in Middleton's stores. The questions raised by pleadings are two: *one of fact*. Have defendants proved the usage set up in their plea? *The other of law*. Can usage of the king invoked over-ride the law and the contract as contained in the bought and sold notes? As to the usage and custom, defendants examined only two witnesses, Heward, the broker, and Muirhead, a gauger in Campbell's employ. Heward says the invariable usage is "when barrels are partially empty to make full barrels out of the whole lot. In consequence of the volatile and subtle character of coal oil, it is perfectly well understood in the trade in Montreal, when any given number of barrels of coal oil are sold in store, as the oil in this case was, that the barrels cannot be full, and, consequently, the oil is sold at so much a gallon, and paid for according to the actual result of the gauging here. This is the usage and custom of trade in Montreal. Cross-examined he says: "The practice is, that, in case of purchase of a specific quantity of barrels, say 400, the buyer gets only what the 400 may contain." Now, this usage cannot avail defendants, for they did not give the 400 barrels as they were, with their contents more or less, but only 352, keeping the empty barrels to themselves, which are worth from sixty cents to one dollar each. Murhead says: "The custom is when any lot of coal oil has to be gauged and any of the barrels com-

posing the lot are partially empty, to make full barrels of the whole lot before gauging." This may fairly be taken to support plaintiff's pretension, that defendants should have filled the 400 barrels up, before gauging or delivering them. But, when cross-examined, this witness states that, if 400 barrels were sold, the purchaser, by custom and usage, is entitled to receive 400 barrels: that is the custom "in large lots to made full barrels out of the lot." The following question is then put: *Question:* "Are you aware of any usage of trade which would allow a seller of a certain number of barrels, without any particular lot being mentioned in the contract, delivering a less number of barrels than the quantity mentioned in the contract?" *Answer:* "Not unless specially stated." The witness Maume, a coal oil merchant, examined on behalf of respondent, shews distinctly his understanding of the usage or custom. "If there is no bargain to the contrary the quantity of oil in each barrel would be gauged and paid or, and the barrels be handed over to the purchaser." Again. *Question*: In case of the sale, say of 400 barrels at so much per gallon, to be ascertained by gauging, do you know of any custom or usage which, without an agreement, would permit the seller to deliver, say, 352 full barrels, himself keeping the empty barrels?" *Answer*: "In such a case, the seller, so far as I am acquainted with the usage and custom, either delivers the 400 barrels, gauging what is in the barrels, or he fills up the 400 barrels full." He says empty barrels in July, 1867, were worth one dollar per barrel, at present only sixty cents. The usage contended for by the pleas is not proved. The contract is not complied with, either by delivering 400 barrels with their contents more or less, or by delivering 400 full barrels, which is what the contract meant. Heward, defendant's witness, says, defendants had 1000 barrels of coal oil in store, and it would have been easy to have filled up the barrels, or at least have given plaintiff the 400 barrels as they were, to complete the number given in the contract. Without any qualifying words in the contract, a sale of 400 barrels generally means a sale of 400 *full* barrels. If the 400 barrels were seen and pointed out, and were sold as they were, at so much per gallon, then the 400 barrels should still be delivered, and the purchaser is entitled to each and every one of them before his contract is fulfilled. The appellants failed to deliver 400 full barrels, or 400 barrels partially full. And yet from their notarial protest of 13th August, 1867, (Doucet, N. P.), one would suppose the whole of the 400 barrels were tendered. In the plaintiff's protest of the 22nd August, plaintiff offers to pay the balance of the price on receiving Campbell's gauge for 400 barrels; and to his demand for the 400, the answer is

"our answer is recorded in the protest served on him and above referred to." That protest goes on as if the 400 barrels had been tendered and refused, which is not the case. The defendants construe the contract as if it had been for the "delivery of all the oil that may be in the 400 barrels lying in such a place, at so much a gallon, empty barrels to belong to seller." This is not the contract as evidenced by the brokers' notes. Can any usage avail to change the contract as made, into a contract such as defendants want to make it? The plaintiff submits that no usage can convert the contract for 400 barrels into a contract for 352. The contract binds the parties as made; the court is to construe the contract, and it is submitted that the judgment brought up for review is well founded and ought to be sustained. The attempt to fix a liability on plaintiff by the witness Heward, from the delivery of the invoice for the 352 barrels, and a vague promise to pay for the oil, ought not to be allowed to stand as a waiver of plaintiff's right to the 400 barrels, more especially as Heward does not say that Ruston would be satisfied with less than 400 barrels, but simply that the invoice was correct. The evidence of appellant as to usage is insufficient and contradictory, and ought not to be allowed to control the written contract. There was no evidence on the part of respondent of any special damage by a rise in the price of oil, and the judgment rendered by the judge in the court below condemned the appellant to pay simply the deposit of $400 acknowledged as paid under the contract, less the sum of $170 84, tendered with the plea, and paid over to respondent previous to the judgment. This judgment was maintained in review, and, as respondent submits, should be affirmed in appeal.

BADGLEY, J.: This contention arises from a broker's contract of sale and purchase of 400 barrels of coal oil, stored in Middleton's store, according to the gauged quantity of the contents of the barrels at 17 cts per gallon, payable, as per agreement, in fifteen days after the gauge certificate shall have been delivered to the purchaser, with a cash deposit of $400, which was forthwith paid. The oil sold was to be the contents of 400 barrels and no more, and the amount payable was to be fixed by the gauged quantity in the 400 casks, which amounted to 13780½ gallons, for which the regular gauge certificate was obtained by the broker, who at once delivered it to the purchaser, with a statement or bill of parcels of the amount due at the price agreed upon. The oil had been taken from the barrels so as to make up 352 full barrels, and the bill of parcels charged that number of full barrels only, which was explained at the time, corroborating the proof adduced of the fact well known to the trade and also to appellant, that

the barrels of this oil are never full, owing to the volatile nature of the article, and are not bought and sold as full barrels except upon the hazard assumed by the buyer, the purchase in common being upon the gauged quantity found in the casks, not the gauge of the casks themselves. Ruston manifestly acknowledged this, because, upon receipt of the gauge certificate and the bill of parcels from the buyer, he made no difficulty, but assumed the gauged quantity in the 352 full casks as his bargain, and at once marked both with the day of receipt of both, and further endorsed upon the certificate the date of payment to be made by him after the fifteen days agreed upon from the delivery to him of the certificate, himself writing upon the certificate, *due 8th May*, the proper day of payment. This fact is clearly proved and establishes his liability in conformity with his agreement, and that was corroborated by his promise, when the payment became due, and on subsequent days, to pay the amount without making the slightest objection of any kind. It was only when he did not meet his engagement and without making any objection, that he had recourse to law and declared that the bargain had been for 400 full barrels, and not for the gauged contents of 400 barrels: he therefore claimed back his deposit of $400 and also demanded $1200 of damages for the non-delivery of 400 full barrels. Had his demand succeeded, he would have made a very satisfactory operation for himself, however doubtful its good faith might have been. The court below, however, rejected the damages, but held for him the $400 of his advance, a judgment which seems not a little inconsistent with itself, because, if he was entitled to repayment of his advance in full, it could only have been predicated upon the fact of his alleged bargain for full barrels being established, but not carried into effect by the appellants, and he would, under those circumstances, have been entitled to damages also. But, in fact, this was not the case, and appellants, the sellers, were finally compelled to realize the gauged quantity at a slight loss, but at the best and current market rate, and, deducting the usual expenses incurred for sale, &c., from the $400 advance in their hands, they made up the balance of it to his credit, which they tendered to him with costs of his action, incurred up to the filing of their plea. The respondent refused the tender and proceeded to final judgment upon his demand, which accorded to him the $400 in full, but refused the damages, and set aside the appellants' plea of tender. The respondent has not appealed from the judgment and therefore is satisfied with it, and it will also be seen that he made no claim for the 48 empty barrels. Under the circumstances of the case, respondent's pretensions are unfounded,

he cannot escape from his bargain and his frequent promises to pay the amount of the gauged quantity, and not having disproved the correctness of the amount tendered, appellants' plea of tender must be maintained, and respondent will be condemned to pay the costs of his unjust contention in the Superior Court from the filing of the plea, together with the full costs of the Court of Revision and also of this court.

The judgments of the courts below were accordingly reversed, and judgment was rendered according to the conclusions of appellants' pleas; the Court of Appeal assigning the following reasons: "Considering that respondent purchased from appellants the quantity of coal oil in the declaration and pleadings mentioned, for the price, and payable at the term of payment in the pleadings aforesaid set forth, namely, the gauged quantity of the said oil, specified in the certificate of gauge thereof delivered to him and agreed to and adopted by him; considering that respondent agreed to receive the oil, and at the time when the price thereof was payable and at divers times thereafter, previous to the institution of this action, promised and undertook to pay the same to appellants, without any objection against the same by respondent, but finally refused to receive the said oil and to make the said payment therefor, in breach of his said agreement and promise in that behalf; considering that appellants were therefore compelled to realize the said gauged sold quantity of oil, at the current market price therefor, and did, in consequence, realize and sell the same at the best market price to be obtained therefor, and did thereby incur certain costs and expenses, whereof respondent was liable, by reason of his breach of his said agreement and promise, and which said costs and expenses were, of right, deducted by appellants out of and from the advance of $400, deposited with them by respondent as earnest money of his purchase; considering that the sum tendered by appellants to respondent in and with their plea in this behalf, together with the costs of suit up to the fyling of the plea, was the actual balance remaining of the su m so advanced, for the recovery whereof, among other things, this action was instituted against them by respondent, after deducting the said costs and expenses from the amount of the said advance, and was a valid and sufficient tender by appellants in this behalf, which was refused by respondent, and the said contention and plea in this behalf of appellants were contested by respondent, until judgment was rendered upon the said contention."

Judgment of Superior Court and Court of Review reversed. (14 *J.*, p. 325)

STRACHAN BETHUNE, Q. C., for appellants.

A. and W. ROBERTSON, for respondent.

APPEAL.—PROCEDURE.

COURT OF QUEEN'S BENCH, Montreal, 9th December, 1869.

Coram DUVAL, C. J., CARON, J., DRUMMOND, J., BADGLEY, J.

ALEXANDER PERRY, appellant, *and* GEORGE R. S. DEBEAUJEU, *et al.*, respondents.

***Held*: That in questions purely of practice, the Court of Appeal will not, as a general rule, disturb the judgment of the court below.**

This was an appeal from an interlocutory judgment rendered in the Superior Court, at Montreal, by Mr. Justice Berthelot, on the 28th day of February, 1867, rejecting the motion of appellant (defendant in court below) to be permitted to re-plead, in consequence of plaintiffs having been allowed to amend their declaration, when the case stood inscribed for final hearing on the merits, so as to conform with the facts as proved.

CARON, J., said that the question submitted by the appeal was one purely of practice. The judge, in the court below, was allowed a discretion under the statute to grant an amendment such as was allowed in the present instance, and this court is not disposed to enquire whether the judge has exercised that discretion wisely or not. The judgment will, therefore, be confirmed, the Chief Justice (who is unavoidably absent) *dissenting*. Judgment of S. C. confirmed. (1) (14 *J.*, p. 334)

DENIS and LEFEBVRE, for appellant.

R. and G. LAFLAMME, for respondents.

(1) A judgment maintaining the same principle was rendered the same day, in No. 95, *Doyle*, appellant, and *Desjardins*, respondent, *Coram* Caron J., Drummond J., Badgley J., and Monk J.

DISTRIBUTION DES DENIERS PRELEVES PAR LA VENTE DES IMMEUBLES.

COUR SUPÉRIEURE, Sorel, 1869.

Coram LORANGER, J.

COURNOYER *vs* PLANTE, *et* divers, contestants.

Jugé: 1° Que les frais de contestation des créances colloquées, mais payées avant la vente de l'immeuble, lorsque le créancier déclare qu'il a été colloqué sans sa connaissance et sa participation, et qu'il admet la contestation, doivent être payés sur la masse.

2° Que si deux ou plusieurs intéressés produisent en même temps leur contestation à ces créances colloquées en vertu du certificat des hypothèques, ils ne peuvent avoir que les frais d'une seule contestation sur la masse, mais dans ce cas, chaque contestant devra avoir une part égale des frais d'une seule contestation, taxés par le protonotaire.

PER CURIAM : Dans le cas actuel, deux créanciers hypothécaires qui ont, depuis longtemps été payés de leurs créances respectives, ont été colloqués, en vertu du certificat des hypothèques fourni par le registrateur. Ces créanciers n'ont pas eu connaissance de ces collocations, et, sur les contestations qui en ont été faites, ils ont déclaré avoir été payés de leurs créances et ont admis les contestations. Ces contestations sont maintenues. Mais il se présente une difficulté à propos des frais. Deux intéressés ont contesté les mêmes collocations et ont produit leurs contestations en même temps. Les frais de contestations, dans le cas actuel, doivent être payés sur la masse, en vertu de l'article 745 du Code de Procédure Civile. Mais les frais de chacune des contestations seront-ils pris sur la masse ? Cela ne serait pas juste. Tout intéressé peut contester une collocation dans un cas analogue à celui-ci, et, s'il y avait cinq ou six contestations de produites en même temps et s'il fallait accorder les frais sur chacune, tous les deniers prélevés et à être distribués ne suffiraient pas pour payer les frais. Il faut que la masse paie les frais faits dans l'intérêt commun, mais seulement les frais nécessaires. Or, une seule contestation suffisait, il ne doit y en avoir qu'une de payée. A qui ces frais d'une seule contestation seront-ils payés, deux intéressés ayant produit leur contestation en même temps ? La justice exige qu'ils en aient chacun une part égale. Il est donc ordonné que, sur les deniers à être distribués de nouveau, chaque contestant soit colloqué pour une moitié sur les frais d'une seule contestation, tels que taxés par le protonotaire. (1 *R. L.*, p. 38)

CAUTIONNEMENT POUR FRAIS.

COUR SUPÉRIEURE, Sorel, 1869.

Présent : LORANGER, J.

DUPRÉ *vs* CANTARA, *et* CANTARA, opposant, *et* LAROCHELLE, contestant.

Jugé : Qu'on ne peut demander des cautions pour frais à un opposant résidant hors de la province, qui fait une opposition à fin de conserver. (1)

PER CURIAM : Motion *Judicatum Solvi* du contestant Larochelle contre l'opposant Cantara. Sur le retour du shérif constatant qu'il a en mains des deniers provenant de la vente d'un immeuble du défendeur, l'opposant, qui réside aux Etats-Unis, a produit une opposition à fin de distraire, alléguant qu'il était propriétaire de l'immeuble vendu, et, convertissant en opposition à fin de conserver son droit à une opposition à fin de distraire, il réclame les deniers provenant de la vente. Sur cette opposition le contestant Larochelle a comparu ; a déclaré qu'il contestait l'opposition et a fait motion que l'opposant fut tenu de donner caution pour frais, en vertu de l'article 29 du Code Civil et les articles 128 et 129 du Code de Procédure Civil. Cette motion ne peut être accordée. Dans une instance ordinaire, sur une action, le demandeur attaque, et le défendeur attaqué a droit de demander à celui qui réside hors de la province, et qui lui fait faire des frais, caution pour le garantir de ces frais : mais, dans le cas d'une opposition à fin de conserver, l'opposant ne joue qu'un rôle passif. Il n'est pas agresseur. Il est appelé comme tous les intéressés à venir faire sa réclamation. Il ne forme donc pas une instance ordinaire, mais il est dans la position d'un défendeur qui défend son droit. Dans le cas actuel, on vend la propriété de l'opposant,

(1) V. la cause de *Brigham* vs *McDonnell*, et *Devlin*, opposant, 8 R. J. R. Q., p. 460 ; 19 R. J. R. Q., p. 407, et 10 D. T. B. C., p. 452 ; la cause de *Merrill* vs *McDonald et al.*, et *Ross et al.*, opp. 6 J., p. 40, et 19 R. J. R. Q., p. 407.

L'intervenant résidant à l'étranger, qui intervient pour prendre le fait et cause du défendeur, est tenu de fournir au demandeur caution pour les frais. (*Scott et al.* vs *Austin*, et *Young et al.*, intervenants, C. S., Montréal, 31 décembre 1860, MONK, J., 5 J., p.5 3, et 9 R. J. R. Q., p. 23)

Un opposant à fin de conserver, qui déclare qu'il entend contester l'opposition à fin de conserver d'un autre opposant, a le droit d'obtenir, avant de produire sa contestation, que cet autre opposant qui est désigné dans son opposition comme résidant en dehors de la province, lui fournisse cautionnement pour les frais de la contestation de son opposition. (*Bonacina* vs *Bonacina*, et divers opposants, C. S., Montréal, 17 septembre 1859, BADGLEY, J., 4 J., p. 148 ; 13 R. L., p. 494, et 8 R. J. R. Q., p. 156.

il se présente pour conserver ses droits ; ce serait une injustice de lui refuser de faire valoir ses droits à moins de donner caution pour les frais. Ce n'est pas un cas pour *Judicatum solvi*. La motion doit être rejetée. (1 *R. L.*, p. 39)

EMPHYTHEOSE.

COUR SUPÉRIEURE, Sorel, 1869.

Présent : LORANGER, J.

PRÉCOURST *vs* VIDAL.

Jugé : Que les droits d'un bailleur emphythéotique peuvent être saisis et décrétés comme un immeuble par les créanciers du bailleur. Que, dans ce cas, le domaine direct seul est saisi et vendu, le décret n'affectant pas les droits de l'emphythéote et ne changeant en aucune manière les conditions de l'emphythéose. Seulement l'emphythéote change de créanciers, et doit payer le canon emphythéotique à l'adjudicataire, au lieu de payer à son bailleur comme avant le décret.

PER CURIAM : Béland a cédé un emplacement, par bail emphythéotique, pour 99 ans, au défendeur Vidal, moyennant une redevance annuelle. Le demandeur Précourst, créancier de Béland, a obtenu un jugement contre ce dernier et a fait saisir tous ses immeubles, parmi lesquels s'est trouvé l'emplacement loué à Vidal. Tous les immeubles de Béland, y compris l'emplacement dont il s'agit, ont été vendus par décret, et Précourst en est devenu adjudicataire. Par après, Précourst a vendu à Vidal l'emplacement en question, moyennant une rente annuelle de $5.00. Acte de cette vente a été passé, et Précourst poursuit sur cet acte pour des arrérages de rente. Vidal plaide que le décret en vertu duquel Précourst a acquis cet emplacement, est nul ; que le décret n'a pas affecté l'emphythéose ; que c'est lui, Vidal, qui est encore propriétaire de l'immeuble, et que Béland n'a jamais cessé d'être son créancier ; qu'ainsi Précourst n'a jamais été propriétaire de cet emplacement ; qu'il n'a pas pu le lui vendre, et qu'en conséquence son acte de vente est nul. La question est de savoir si, pendant l'emphythéose, les droits du bailleur peuvent être saisis et décrétés ; si la propriété donnée à bail emphythéotique peut être décrétée sur le bailleur, et quelles sont les conséquences de ce décret. L'emphythéose opère le démembrement de la propriété en domaine direct et en domaine utile. Le preneur acquiert le domaine utile. L'emphythéose entraîne l'aliénation pour la durée du bail ; mais le bailleur conserve le domaine direct, et, à l'expiration du bail, le domaine utile rentre dans la main du bailleur et se confond avec le domaine

direct. Pendant l'emphythéose, la propriété peut être saisie sur le bailleur, mais le décret n'a pas d'autre effet que de transporter le domaine direct entre les mains de l'adjudicataire. Plus tard, à l'expiration du bail, l'adjudicataire aura droit d'entrer en possession du domaine utile, mais, tant que le bail dure, ce domaine utile reste entre les mains du preneur, dont les droits ne sont pas affectés par le décret. Dans le cas actuel, Béland a transporté à Vidal le domaine utile pour 99 ans. Les créanciers de Béland n'ont pu saisir et faire décréter que le domaine direct. Avant le décret, Béland était bailleur, et Vidal, preneur. Depuis le décret, Vidal reste encore preneur, mais son créancier est changé ; c'est l'adjudicataire qui est maintenant son bailleur et a droit de réclamer le canon emphythéotique. Depuis le décret, Précourst, le demandeur et l'adjudicataire, est propriétaire du domaine direct. Les mêmes rapports qui existaient entre Béland et Vidal existent, depuis le décret, entre Précourst et Vidal. L'adjudication n'a eu que l'effet de transporter les droits du bailleur. Le domaine direct peut-être l'objet d'un décret comme le domaine utile. Précourst avait donc le droit de vendre le terrain en question à Vidal. La convention a eu l'effet de changer le domaine utile de Vidal en un domaine parfait. Son droit d'occuper la propriété pendant 99 ans est devenu perpétuel. Le contrat de vente est légal, et le défendeur est sans droit de prétendre qu'il ne doit pas payer le prix y stipulé. Jugement pour le demandeur. (1 *R. L.*, p. 42)

OPPOSITION A FIN D'ANNULER.

COUR SUPÉRIEURE, Sorel, 1869.

Présent : LORANGER, J.

L-H. LAFLEUR, demandeur, *vs* LS VERVILLE, défendeur, *et* LS VERVILLE, opposant.

Jugé : 1° Que, lorsqu'un défendeur est saisi pour plus qu'il ne doit sur le jugement rendu contre lui, le demandeur ne lui donnant pas, lors de la saisie, crédit d'acomptes reçus, il a un droit absolu de faire opposition.

2° Qu'il n'est pas tenu d'offrir et de déposer, avec son opposition, la balance redue, mais qu'il peut purement et simplement s'opposer à la saisie et en demander la réduction.

PER CURIAM : Le demandeur a obtenu jugement contre le défendeur pour cinquante piastres, et, depuis, le défendeur a, par des acomptes donnés, réduit sa dette à une quinzaine de piastres. La saisie, cependant, a été pratiquée pour tout le

montant. De là opposition de la part du défendeur qui demande à ce que la saisie soit annulée. Le demandeur, contestant cette opposition, maintient: 1° que la saisie telle que pratiquée ne donne pas droit au défendeur de faire une opposition, parce que le défendeur, lors de la saisie et du commandement qui lui a été fait de payer, devait faire offres réelles de la balance qu'il redevait. Si le demandeur eût refusé cette balance, alors seulement, le défendeur aurait eu le droit de faire opposition; que l'intention du demandeur était de ne vendre les meubles du défendeur que jusqu'à concurrence de la balance redue; 2° que, dans tous les cas, l'opposition est mal fondée et doit être déboutée, en autant que le défendeur n'offre et ne dépose pas en cour, avec son opposition, la balance qu'il redoit. La contestation du demandeur est mal fondée. Le défendeur, saisi pour plus qu'il ne doit, a un droit absolu de s'opposer à la saisie et de demander qu'elle soit réduite. Il n'est pas obligé de déposer en cour la balance qu'il redoit. Cette opposition a lieu par la faute du demandeur qui ne devait saisir que pour ce qui lui était dû. L'opposition est maintenue. La saisie n'est pas annulée, mais est réduite au montant dû, et le demandeur est condamné à payer tous les frais. Articles 581 et 653 du Code de Procédure Civile. (1 *R. L.*, p. 45)

MINORITE.

COUR SUPÉRIEURE, Sorel, 1869.

Présent: LORANGER, J.

L.-E.-D. CARTIER *vs* JOSEPH PELTIER.

Jugé: Qu'un défendeur, poursuivi sur un billet qu'il a consenti étant encore mineur, ne peut faire renvoyer l'action, en plaidant le seul fait qu'il était mineur lorsqu'il a consenti le billet, mais que, pour réussir, il doit encore demander, par sa défense, à être relevé de l'obligation qu'il a contractée durant sa minorité, en alléguant qu'il a été lésé, et de quelle manière il a été lésé.

Le défendeur est poursuivi sur un billet de $50.00 qu'il a consenti étant encore mineur. Il plaide le seul fait qu'il était mineur lorsqu'il a consenti le billet et conclut à ce que l'action du demandeur soit renvoyée. Sa défense est insuffisante. Il faut qu'il allègue qu'il a été lésé en consentant ce billet; comment et de quelle manière il a été lésé, et demander à être relevé de son obligation. Jugement pour le demandeur. (1 *R. L.*, p. 46)

POUVOIRS D'UN SYNDIC ET BANQUEROUTE.

COUR SUPÉRIEURE, Sorel, 1869.

Présent : LORANGER, J.

BARTHE *vs* ARMSTRONG.

Jugé : Qu'un syndic peut accepter une obligation donnée par un adjudicataire et des cautions, pour le prix de vente d'un immeuble décrété par lui ; qu'il a droit de poursuivre l'adjudicataire et ses cautions pour le recouvrement de l'obligation, et qu'il n'est pas obligé de procéder par une folle enchère. (1 *R. L.*, p. 47)

REQUETE CIVILE.

COUR SUPÉRIEURE, Sorel, 1869.

Présent : LORANGER, J.

NARCISSE LAMBERT *vs* MARIE GAUCIN.

Jugé : 1° Qu'une requête civile peut être accordée par le protonotaire, en vacance, en l'absence du juge résidant dans le district.

2° Qu'une motion pour faire rejeter telle requête civile, sur le principe que les raisons invoquées dans la requête civile sont insuffisantes pour en faire obtenir les conclusions, ne peut être accordée, parce qu'un tel moyen ne peut être invoqué par une défense en droit. (1 *R. L.*, p. 47)

BILLET PROMISSOIRE.

COUR SUPÉRIEURE, Sorel, 1869.

Présent : LORANGER, J.

LA BANQUE DU PEUPLE *vs* ETHIER.

Jugé : Qu'un billet promissoire, qui n'est pas à ordre, ne peut être transporté par endossement en blanc, par la personne en faveur de qui le billet a été consenti.

PER CURIAM : L'action doit être déboutée, avec dépens, le créancier du billet n'étant pas devant la cour, et le défendeur étant poursuivi par un demandeur qui n'est pas son créancier. (1 *R. L.*, p. 47)

BREF DE PROHIBITION.

COUR SUPÉRIEURE, Sorel, 1869.

Présent : LORANGER, J.

Ex parte JAMES ARMSTRONG, requérant prohibition.

Jugé : 1° Qu'un corps municipal, qui a le droit d'émaner des brefs de saisie, pour le paiement de taxes et cotisations à la municipalité, est un tribunal inférieur à qui un bref de prohibition peut être adressé, lorsqu'il excède sa juridiction.

2° Qu'un contribuable saisi pour cotisations ne peut obtenir un tel bref de prohibition, sur son allégué que la corporation lui est endettée pour un montant plus considérable que celui pour lequel il est saisi, et qu'il y a lieu à la compensation des créances ; que, dans ce cas, il n'y a pas eu excès de juridiction, parce que le maire avait droit d'émaner une saisie sur le rôle de perception homologué, qui constatait que les cotisations étaient dues, et qu'il faut que l'excès de juridiction apparaisse à la face même des procédés pour donner droit au bref de prohibition. (1 *R. L.*, p. 48)

PROCEDURE.—AVIS DE PLAIDER.

COUR SUPÉRIEURE, Sorel, 1869.

Présent : LORANGER, J.

ARMSTRONG *vs* BARTHE.

Jugé : Qu'on ne peut faire motion pour rejeter du dossier un avis de plaider, ce procédé n'affectant pas la cause, quand même l'avis aurait été donné improprement et irrégulièrement. Que les procédés subséquents à l'avis peuvent seuls affecter la cause, et, s'ils sont adoptés irrégulièrement sur tel avis de plaider, ce sera le temps pour le défendeur de se pourvoir. (1 *R. L.*, p. 49)

HUISSIERS.—HONORAIRES.

COUR SUPÉRIEURE, Sorel, 1869.

Présent : LORANGER, J.

LOZEAU *vs* COTÉ.

Jugé : 1° Que les huissiers résidant dans les paroisses du district ne peuvent, sur signification de subpœnas dans la paroisse où ils résident, charger la route depuis le Palais de Justice jusqu'au lieu des significations, mais doivent charger la route de leur domicile seulement, et cela quand même ils viendraient chercher ou rapporteraient les subpœnas au chef-lieu.

2° Que les subpœnas doivent leur être envoyés par la malle, et que, s'ils font la route au chef-lieu, cette route doit leur être payée par la partie qui les emploie.

3° Qu'en thèse générale, on ne peut juger de la même manière pour la signification d'une action ou de toute autre pièce de procédure qui pourrait nécessiter des instructions particulières à l'huissier.

PER CURIAM : Motion du défendeur, pour faire reviser le mémoire de frais taxé par le protonotaire. Dans ce mémoire de frais se trouvent inclus les honoraires de l'huissier Martel, résidant à la Baie, qui, sur signification de subpœnas, avait chargé la route à partir de Sorel. Il a été prouvé qu'à la réquisition du demandeur, Martel est venu chercher les subpœnas au chef-lieu, et, après les avoir signifiés, a envoyé son retour par la malle. Le voyage de l'huissier à Sorel doit être payé par le demandeur, qui aurait dû venir chercher les subpœnas lui-même, ou les faire parvenir par la malle. Des huissiers sont nommés dans les diverses paroisses du district, et c'est pour épargner des frais aux parties. La signification des subpœnas ne requérant aucune instruction particulière, les subpœnas doivent être expédiés par la malle. Il n'en serait pas de même en thèse générale, pour signification d'une action, ou d'une autre pièce de procédure, qui pourrait nécessiter la présence de l'huissier au chef-lieu, lorsqu'il est démontré que l'huissier a fait la route. La motion pour reviser la mémoire de frais est accordée. Les frais de route pour signification de subpœnas et payés par le défendeur seront remis à ce dernier. (1 *R. L.*, p. 49)

DOUAIRE PREFIX.

COUR SUPÉRIEURE, Sorel, 1869.

Présent : LORANGER, J.

PARENT *vs* DE TONNANCOUR.

Jugé: Que le douaire préfix a lieu, et que la femme peut le réclamer lorsque la communauté de biens se dissout par la séparation judiciaire, et qu'il a été stipulé par le contrat de mariage que le douaire aurait lieu et que la femme aurait le droit de le réclamer, "arrivant la dissolution de la communauté par mort ou autrement." (1 *R. L.*, p. 50)

GARDIEN.—MEPRIS DE COUR.

COUR SUPÉRIEURE, Sorel, 1869.

Présent : LORANGER, J.

PATOILLE *vs* GUILMETTE, *et* GUILMETTE, mis en cause.

Jugé: Qu'un défendeur nommé gardien à la saisie pratiquée sur lui, contrairement aux ordonnances et aux dispositions du Code de Procédure Civile, ne peut sur règle *nisi*, sur son défaut de représenter les effets, être condamné à l'emprisonnement pour mépris de cour. (1 *R. L.*, p. 51)

HUISSIER.—ELECTION DE DOMICILE.

COUR SUPÉRIEURE, Sorel, 1869.

Présent : LORANGER, J.

LÉGARÉ *vs* DÉROCHES, *et* DÉROCHES, opposant.

Jugé : Que l'article 1081 du Code de Procédure Civile, concernant l'élection du domicile, par l'huissier saisissant pour le poursuivant, ne s'applique qu'aux causes susceptibles d'appel. (1 *R. L.*, p. 51)

COMMISSAIRES D'ECOLE.

COUR SUPÉRIEURE, Sorel, 1869.

Présent : LORANGER, J.

HENRI AUDETTE DIT LAPOINTE *et al.*, requérants certiorari, *vs* JEAN DUHAMEL, intimé.

Jugé : 1° Que les membres d'une corporation qui votent de bonne foi une résolution adoptée par la majorité, ne peuvent être responsables personnellement pour les décisions du corps dont ils font partie, quand même ces décisions seraient en contravention à un statut qui punit telle contravention d'une amende.

2° Que, par le chapitre 15, section 110, sous-section 10, du statut refondu du Bas-Canada, il n'est pas défendu absolument aux commissaires d'école d'une municipalité scolaire d'engager un maître d'école non diplômé, et le fait d'engager un maître d'école non diplômé n'est pas une contravention aux dispositions du chapitre 15, punissable en vertu de la section 126.

3° Que, pour soutenir une plainte faite en vertu de la section 125, il faut qu'il soit allégué dans cette plainte que l'accusé a commis la contravention *volontairement*.

Trois commissaires d'école de la paroisse de Saint-Roch-de-Richelieu ont été poursuivis devant les juges de paix, par l'intimé, pour avoir contrevenu aux dispositions du statut refondu du Bas-Canada, chapitre 15, section 110, sous-section 10, en engageant un maître d'école non diplômé. La résolution avait été adoptée par le vote des trois commissaires accusés, les deux autres commissaires présents ayant voté contre. La plainte alléguait que ces trois commissaires avaient, par leur vote, résolu l'engagement qui avait été conclu dans la suite, mais n'alléguait pas qu'ils avaient contrevenu *volontairement* aux dispositions du statut. Cependant les juges de paix, sur preuve que la résolution avait été votée par eux, les ont condamnés à payer chacun une amende de cinq piastres. Les commissaires condamnés ont obtenu un *certiorari* sur cette conviction, et,

pour la faire casser, alléguaient : 1° Que le fait d'engager un maître d'école non diplômé n'est pas une offense, aux termes du Statut refondu du Bas-Canada, chapitre 15 ; 2° Que l'acte inculpé n'était pas leur acte personnel, mais l'acte collectif de la corporation des commissaires d'école de la paroisse de Saint-Roch-de-Richelieu, des actes de laquelle ils n'étaient pas responsables personnellement ; 3° Qu'ils n'étaient pas responsables personnellement des votes qu'ils avaient donnés comme membres de ladite corporation, parce qu'en donnant ces votes ils avaient agi de bonne foi ; 4° Qu'enfin la plainte était insuffisante, en autant qu'elle n'alléguait pas que la contravention avait été commise *volontairement*, ce qui était essentiel pour caractériser une contravention aux termes du statut.

PER CURIAM : La loi ne fait pas aux commissaires d'école une prohibition absolue d'engager un maître non diplômé, mais une prohibition relative. Elle leur laisse l'alternative d'engager un maître diplômé ou un maître qui ne l'est pas, mais, dans ce dernier cas, la municipalité perd l'allocation accordée pour l'encouragement de l'éducation. Or, il peut y avoir des cas spéciaux où les commissaires peuvent être justifiables de préférer perdre l'allocation des écoles, et où la municipalité gagnerait à voir un maître non diplômé. Cela est laissé à la discrétion des commissaires d'école. Ils sont les juges des circonstances. Ils ont été choisis par la paroisse pour gérer les affaires de la municipalité scolaire, et leurs constituants ne peuvent se plaindre de leur gestion, s'ils se trompent de bonne foi. La loi ne punit pas un membre d'une corporation pour la part qu'il a prise, en sa qualité officielle, à l'acte de la corporation, à moins qu'il ne se soit abrité sous le manteau officiel, pour commettre un délit volontaire. Qu'arriverait-il si on admettait qu'un commissaire d'école doive être puni toutes les fois qu'il agit en sa qualité officielle contre l'intention de la loi ? La conséquence de cette doctrine rigoureuse serait que personne ne voudrait accepter cette charge, et qu'on punirait à tout moment les commissaires pour des fautes officielles commises involontairement et par ignorance de la loi. La loi protège le membre de la corporation pour ses actes officiels. Le seul cas où il ne peut exiger cette protection est lorsqu'il s'est servi de son manteau officiel pour commettre un acte criminel et malicieux. Dans le cas actuel, en supposant qu'il y aurait une offense aux termes du statut, il n'y a rien qui fasse voir que les commissaires ont agi de mauvaise foi et malicieusement. Enfin, la plainte et la conviction ne démontrent pas une contravention caractérisée, ainsi que le veut le statut. Un acte, qui n'est pas criminel aux termes du droit commun, peut être une offense en vertu d'un statut particulier, lorsqu'il est revêtu de certains caractères. Dans ce cas, il faut alléguer

l'offense en se servant des termes mêmes du statut ou de termes équivalents. Or, dans le cas actuel, les requérants n'ont pas été accusés ni convaincus d'avoir contrevenu *volontairement* aux dispositions du statut. Le mot *volontairement* est essentiel pour donner à l'acte inculpé le caractère de l'offense, aux termes du chap. 15, sec. 125, du statut refondu du Bas-Canada. Il n'y a donc pas eu d'offense punissable par ce statut. Pour toutes ces raisons, la conviction des juges de paix est cassée. (1 *R. L.*, p. 52)

CORPORATIONS MUNICIPALES.

COUR SUPÉRIEURE, Arthabaska, 1869.

Coram POLETTE, J.

OCTAVE GAUDET *vs* LA CORPORATION DU CANTON DE CHESTER-OUEST.

Jugé : **Qu'une corporation municipale est tenue d'indemniser pour tous les dommages résultant du mauvais état de ses chemins.**

PER CURIAM : Le demandeur est un marchand ; il réside dans le canton de Ham-Nord ; il communique à Montréal, par le chemin de fer du Grand-Tronc, en passant par la station d'Arthabaska. Or, pour se rendre de cette station chez lui, il faut traverser tout le canton de Chester-Ouest dont les chemins sont toujours en très mauvais état. La poursuite est intentée pour obtenir des dommages de la corporation, causés à la voiture du demandeur, laquelle avait été brisée sur un tronc d'arbre qui était de temps immémorial dans le chemin ; ensuite des dommages résultant du mauvais état des chemins. Le demandeur, au lieu de mettre 1200 lbs pesant dans les voitures, n'en pouvait mettre que 600 lbs ; au lieu de faire le voyage dans sept heures, il fallût en mettre quatorze, sans compter les dommages faits aux voitures et aux bêtes de trait. Ces faits étant prouvés, la cour a déclaré que ces dommages étaient dus par la corporation, qu'il y avait négligence grossière dans le cas actuel, et qu'elle était obligée de condamner la corporation, à peu de chose il est vrai, car il n'avait été prouvé que de bien faibles dommages, $12 étaient accordées au demandeur ; mais, s'il en avait été constaté et prouvé de plus élevés, il les aurait également obtenus. Il faut que les municipalités soient convaincues d'une chose, c'est qu'elles ont été établies spécialement pour maintenir les chemins dans un ordre parfait, afin de pouvoir, non-seulement y voyager, mais y voiturer de lourdes charges, en toute saison de l'année, et

que les corporations sont responsables de tous les dommages qui résultent pour les individus, à cause des mauvais chemins. Cette interprétation est la seule possible de notre acte municipal. Ainsi, qu'il soit bien compris que cette interprétation sera suivie à l'avenir dans toutes les actions en dommages qui seront portées devant ce tribunal. S'il en résulte des conséquences fâcheuses pour les corporations, les conseillers municipaux seront, avant tout, les coupables, mais les corporations en devront subir tout le poids. Il faut que les chemins soient toujours tenus en bon ordre; c'est la première condition de la prospérité du pays, surtout pour assurer le succès de la colonisation de toutes les terres incultes qui sont non-seulement très-fertiles, mais d'une grande richesse minérale. Chacun doit être pénétré de cette question et les conseillers municipaux avant tout. (1 *R. L.*, p. 75)

DONATION A CAUSE DE MORT.

COUR SUPÉRIEURE, Sorel, 28 novembre 1869.

Coram LORANGER, J.

MARIE-L. RAICHE *vs* JOSEPH ALIE.

Jugé: 1° Qu'une donation entre-vifs, faite avec toutes les formalités d'un tel acte, quelques jours avant la mort du donateur, lorsque la cause déterminante de la mort ne s'est déclarée que depuis la donation, est valide et ne peut pas être considérée comme une donation à cause de mort et doit être maintenue.

2° Que cet acte de donation doit encore être maintenu, bien que, lors de sa passation, le notaire instrumentant, à cause de l'affaiblissement de sa vue, ne pouvait plus écrire, si ce n'est pour signer son nom.

La demanderesse, par son action, réclamait sa part des biens de la communauté qui avait existé entre elle et Joseph Alie, son défunt mari, et poursuivait le défendeur, son fils, pour faire résilier un acte de donation qu'elle lui avait consenti conjointement avec son mari; pour l'obliger à faire inventaire des biens de la communauté dont il était en possession, tant comme donataire que comme légataire universel de feu Joseph Alie, et réclamait de lui, entr'autres biens, la moitié de l'immeuble donné par ledit acte de donation dont elle demandait la résiliation. Au soutien de sa demande, elle prétendait, entre-autres choses: 1° Que ladite donation avait été consentie, par son défunt mari et elle, dans un temps bien rapproché de la mort de son mari, qui était malade alors, et que, conséquemment, cette donation devait être considérée comme une donation à cause de mort, et être déclarée nulle, attendu qu'elle avait

été faite dans les formes d'une donation entre-vifs, lorsqu'elle aurait dû être revêtue des formalités voulues pour les testaments ; 2° Que cette donation était nulle encore, parce qu'elle avait été reçue par un notaire aveugle, qui ne pouvait ni lire, ni écrire, et qui, conséquemment, ne pouvait donner l'authenticité à ses actes ; qu'un acte de donation devant être, d'après la loi, passé devant notaires, celui en question ne pouvait être valide que comme sous seing privé. Le défendeur a répondu à cette action : 1° Que, lors de la donation, le donateur conjoint de la demanderesse était malade, il est vrai, mais ne l'était pas de la maladie dont il est mort, maladie qui ne s'est déclarée que depuis la donation, et dont la violence subite a conduit le défunt donateur au tombeau, en quelques jours ; 2° Que le notaire qui avait reçu l'acte n'était pas alors complètement aveugle ; qu'il voyait assez pour signer son nom ; qu'il avait apposé sa signature sur ledit acte de donation, et lui avait par cela seul donné l'authenticité voulue par la loi ; 3° Que cet acte de donation avait été consenti volontairement par les parties qui, d'un commun accord, avaient fait choix du notaire, bien que connaissant parfaitement son infirmité ; que l'acte de donation contenait la convention exacte des parties, et que la demanderesse n'alléguait même pas sa fausseté. A l'enquête les faits suivants furent prouvés : 1° Que lors de la donation, le défunt donateur était atteint, depuis quelques années, d'une maladie dont il pouvait réchapper peut-être, mais qui, plus probablement devait le conduire au tombeau, d'une manière lente toutefois, et en prenant même plusieurs années ; 2° Qu'il ne croyait pas devoir mourir de cette maladie ; qu'il avait disposé de ses biens comme un homme qui doit vivre encore longtemps, et qui ne prévoit pas le terme de sa vie ; entre autres circonstances, il avait stipulé une pension viagère, dont les détails avaient été réglés par lui-même, dans l'espérance d'en jouir longtemps ; 3° Que, le surlendemain de la donation, une maladie autre que celle qui l'affectait depuis une couple d'années, s'est subitement déclarée, qu'elle a marché avec une violence telle qu'il en est mort quelques jours après qu'elle se fût déclarée ; savoir sept jours après la donation ; 4° Que le notaire qui avait instrumenté à la donation avait la vue trop faible pour pouvoir lire et écrire, mais qu'il pouvait signer son nom et reconnaître partout sa signature ; que cette infirmité lui était survenue à la suite d'une maladie qui lui avait presque fait perdre la vue, plusieurs années auparavant ; mais qu'il n'avait pas cessé d'exercer sa profession, faisant écrire ses actes qu'il dictait lui-même, par ses clercs, et les signant ; 5° que la minute de donation dont il est question en cette cause, avait été écrite par son clerc, sous sa dictée, en présence de toutes les parties intéressées, et qu'elle contenait

exactement la convention des parties, ce que, du reste, la demanderesse ne niait pas.

Le jugement a maintenu les prétentions de la défense, et a débouté la demanderesse de son action dans les termes suivants, savoir : " Considérant que la demanderesse est sans " intérêt légal à attaquer le testament de Pierre Alie, reçu " le 26 janvier dernier, devant Blondin, notaire, et témoins, " vu qu'elle n'est ni l'héritière dudit Pierre Alie, ni sa léga- " taire, en vertu d'un autre testament ou donation à cause " de mort, ni à ses droits en aucune manière, et que, pour " ce motif qui doit faire écarter tous les autres et tous les " moyens invoqués par la demanderesse contre la validité " dudit testament, dont il n'est pas loisible à la deman- " deresse de faire la critique, dans la présente instance, de " même que le tribunal doit s'abstenir de juger de la valeur " des moyens ainsi invoqués par elle, elle doit être déboutée des " conclusions par elle prises qui tendent à faire infirmer ledit " testament ; et considérant qu'au soutien du chef de la de- " mande pour faire annuler la donation entre-vifs faite par " Pierre Alie et la demanderesse, conjointement, en faveur du " défendeur, le 26 janvier dernier, devant le même Blondin, " notaire, et témoins, qui invoque le dol, la violence et la " fraude pratiquée par le défendeur comme cause de nullité " de ladite donation, la demanderesse n'a fait aucune preuve " quelconque, et qu'elle a également failli dans la preuve de " son second chef de demande, celui fondé sur ce que, quand " Pierre Alie a fait la donation en question, il était gisant au " lit, malade de la maladie dont il est mort ; que la deman- " deresse n'a pas fait preuve suffisante, et notamment qu'elle " n'a pas prouvé, au désir de l'article 762 du Code Civil, que, " lors de ladite donation, Pierre Alie était attaqué d'une " maladie réputée mortelle ; et qu'à raison d'aucun de ces " deux chefs, la demanderesse n'est recevable dans sa demande ; " considérant enfin que, sur le troisième chef, la demanderesse " ne peut invoquer la cécité ou la faiblesse de la vue du " notaire instrumentaire, comme moyen de nullité dudit acte " de donation, sans en nier la sincérité, et qu'elle admet au " contraire implicitement que cet acte contient l'énoncé fidèle " des stipulations des parties, et que, sur le troisième chef, elle " est encore mal fondée dans sa demande ; la cour a débouté " et déboute la demanderesse de son action, avec dépens." (1 *R. L.*, p. 77)

Mortmain.—A trading corporation cannot acquire or hold lands in Lower-Canada.—Warranty.—Warranty implied by law excluded by express warranty.

PRIVY COUNCIL, July 29, 1873.

On appeal from the Court of Queen's Bench for Lower Canada.

Present: Sir James W. COLVILE, Sir Barnes PEACOCK, Sir Montague E. SMITH, and Sir Robert P. COLLIER.

THE CHAUDIÈRE GOLD MINING COMPANY OF BOSTON, appellants, *and* GEORGE DESBARATS, WILLIAM E. DESBARATS, *and* Dame LOUISE POTHIER, respondents.

A corporation, whether merely trading or not, and whether foreign or domestic, is incapacitated from acquiring as well as from holding lands in Lower Canada without the permission of the Crown being first obtained.

D. sold mining property in Lower Canada to F. In the deed the property was described as having been assigned to D. by "original grantees of the Crown," but it appeared that patents from the Crown had not then been obtained; moreover by the deed D. expressly warranted and guaranteed F. against all mortgages, debts, etc. F. sold the property to a mining company of Boston, United States; and from the deed it might be implied that patents had been granted. The property was subsequently granted by the Crown to some one else, who evicted the company. The company brought an action in the Court of Queen's Bench for Lower Canada against B. as being liable as *arrière-garant* (remote warrantor). The action was dismissed, and on appeal to the Privy Council the judgment was upheld:

Held: That, though a warranty of eviction is implied in contract of sale it must be inferred, from the insertion of a limited conventional warranty in the deed between D. and F., that it was their intention to exclude the larger legal warranty. Thus, on an eviction by the assignee of the Crown, no action could be maintained by F. against D., and, consequently, none by the company. Moreover the disability of the company to acquire lands precluded them from bringing an action on the warranty. (1)

This was an appeal from a judgment of the Court of Queen's Bench for Lower Canada, of the 10th December, 1870, affirming a judgment rendered upon a demurrer by the Superior Court of Lower Canada, sitting at Montreal, in May, 1869, whereby an action, in which appellants were plaintiffs and respondents defendants, was dismissed with costs. The appellants were the Chaudière Gold Mining Company of Boston, in the State of Massachusetts, in the United States of America, a body politic and corporate, duly incorporated

(1) *Des Rivières* et *Richardson*, 1 R. J. R. Q., p. 217, et 19 R. J. R. Q., p. 245; *Freligh* et *Seymour*, 19 R. J. R. Q., p. 245.

under the laws of the State of Massachusetts, for the purpose of and then actually carrying on the business of a mining company there, and at the township of Watford, in the county of Dorchester, and elsewhere, in the province of Quebec. The respondents were the legal representatives of George Desbarats, deceased. By a deed of sale executed on the 24th of november, 1863, at the city of Montreal, by George Desbarats of the one part, and James Foley of the other part, and duly registered, Desbarats, in consideration of $20,000, bargained and sold, and bound and obliged himself, his heirs and assigns, to warrant, grant, guarantee, and defend against all mortgages, debts, and dowers whatsoever, unto James Foley accepting thereof for himself, his heirs and assigns, twenty-five lots of land in the township of Watford, Lower Canada, described in the deed as assigned to Desbarats by the respective original grantees from the Crown of the lots, with the exception of one lot described therein as assigned to him by the assignee of the original grantee, to hold the lots unto Foley, his heirs and assigns, in full and absolute property, subject only to the reservation and conditions that might be mentioned in the patents that might be issued from the Crown. Subsequently, by a deed of sale of the 25th of November, 1863, executed by James Foley of the first part, his wife, Quintina Foley, of the second part, and John H. B. Lang, president, authorized by and acting for appellants, of the third part, and duly registered, James Foley, in consideration of $200,000, bargained and sold the lots of land to appellants, their successors and assigns, for ever, subject nevertheless to the reservations, limitations, provisoes, and conditions expressed in the several original grants thereof from the Crown, and to settlement duties on the lots. Quintina Foley released her right of dower therein, and James Foley entered into a covenant with appellants for title to the lands and for quiet possession thereof. The appellants alleged in their declaration that they purchased the lands in good faith as mining property, and that Desbarats and Foley respectively sold the same as mineral property at a price beyond the value of the land for ordinary purposes, and that both Desbarats and Foley, at the times of the respective sales, knew that they were not proprietors thereof, but sold the same in the expectation that Desbarats would secure the title thereto at the price of land for ordinary purposes, and thereby prevent the eviction to which they knew the vendee would otherwise be exposed, and being content to take the risk of so securing the title. On the execution of the deed of sale of the 25th november, 1863, appellants entered upon and took possession of the lands, and expended thereon $30,000 in improvements and

mining operations to develop their resources. The lands were Crown lands up to about the 5th of March, 1867, and neither Desbarats nor Foley ever got the title or patents thereto. On or about the 5th of March, 1867, the lands were granted by letters patent to Thomas McGreevy, his heirs and assigns, in free and common socage, and McGreevy took possession thereof, and appellants were evicted and obliged to give up the lands to him. Desbarats died on the 12th of November, 1864, having by his will appointed his two sons, the respondents, George Desbarats and W. E. Desbarats, and his two daughters, his universal legatees. His widow, respondent Dame Louise Pothier, and George Desbarats, one of the respondents, were appointed joint tutors of the two daughters, who were minors. These universal legatees of George Desbarats deceased, now represented him and his succession. The appellants prayed that respondents should be declared bound and liable to warrant, indemnify, and hold them harmless from and against the damages of $250,000, which they alleged that they had incurred. The appellants did not allege in their declaration that any license from the Crown had ever been obtained by them to hold lands in Lower Canada. The action was brought by the appellants against the respondents as representing their *arrière-garant*, or remote warrantor, under the 32d section of the C. S. L. C., c. 82, and art. 126 of the C.P.L.C., whereby "in cases of real warranty (*en matière de garantie formelle*), the purchaser who is disturbed or evicted, is not bound to call in first his immediate warrantor, but he may summon in warranty any more remote warrantor who may eventually be bound to intervene in the suit." The respondents demurred, and the cause came on to be heard on demurrer before the Superior Court of Lower Canada, sitting at Montreal, in April and May, 1869; and the action was dismissed with costs.

The judgment of the Superior Court (TORRANCE, J.) was rendered at Montreal, on the 31st May, 1869, and is reported in 19 *R. J. R. Q.*, p. 244; 1 *R. L.*, p. 82, and in 13 *J.*, p. 182. On appeal the judgment was upheld by the Court of Queen's Bench for Lower Canada, sitting at Montreal, on the 10th day of December, 1870, (DUVAL, J. en C., CARON, J., BADGLEY, J., MONK, J., and LORANGER, J. *ad hoc*), three of the justices being in favor of the judgment, and the Chief Justice and the fourth justice dissenting. The ground for the decision was that appellants, being a corporation, were disqualified by the law of Lower Canada from purchasing lands in that country, and were accordingly precluded from bringing an action on the guaranty of lands which they had purchased; and farther, that they had shewn no legal

right of direct recourse against respondents, as their alleged *arrière-garants*, through Foley, their immediate vendor, and the purchaser from Desbarats. Here follows the remarks of the judges in appeal:

Chief Justice DUVAL, dissenting: Admitting that the company, as a foreign body corporate and politic, were under a legal disability to purchase lands in Lower Canada, it is difficult to comprehend by what process of reasoning Desbarats gets to the conclusion that he has a right to keep the company's $200,000 paid to him, and for which he has given them nothing. If the laws of Canada prohibit this purchase, then the sale is absolutely null and void—the deed a piece of waste paper, conferring no legal rights on the purchaser, except as to the restitution of the money paid. The law which is supposed to declare this disability creates no forfeiture—certainly not in favor of one who has participated in its violation, and who is therefore *particeps criminis*. Where, then, is the title of Desbarats to retain the money? For, be it observed, this action is brought to recover back the money paid. But is it true that the laws of Canada prohibit the contract entered into by the parties? The ground stated by defendants is that the company is a *mainmorte*, and the French Edict, 1743, is referred to as creating this disability. The pretension that a few speculative characters, associated together for the purposes of making money by mining operations, are to be considered *gens de mainmorte* is certainly novel. No book of authority giving the definition of a *mainmorte* can be referred to in support of such a pretension. The very words of the declaration of the King of France above referred to exclude any such idea, and the spirit of the declaration is equally against it. Sound policy dictated the laws against *gens de mainmorte;* the same policy would encourage commercial entreprises which enrich the country and its inhabitants. Let us inquire into the character of this company; it will be found clearly defined in plaintiff's declaration, and as the judgment maintains the demurrer which admits the truth of the allegations, the statement in the declaration must be taken as true. President Troplong, in the first volume of his able treatise, *Du contrat de société*, has some very valuable remarks on this subject. I refer particularly to n°s 329 to 333. To the english authorities, Collyn, Bell, Bisset and others, it is not necessary to refer. It has been argued that the C. C. L. C. creates this disability. Art. 366 is referred to. This article will be found to contain an exception, which is explained in art. 358, in these words: "Les droits qu'une corporation peut exercer sont, outre ceux qui lui sont spécialement conférés par son titre ou par les lois générales applicables à l'espèce,

tous ceux qui lui sont nécessaires pour atteindre le but de sa destination. Ainsi elle peut acquérir, aliéner et posséder des biens, plaider, contracter, s'obliger et obliger les autres envers elle." In connection with this article is the 25th of the same Code, in these words: " L'étranger a droit d'acquérir et de transmettre, à titre gratuit ou onéreux, ainsi que par succession ou par testament, tous biens meubles et immeubles dans le Bas-Canada, de la même manière que le peuvent faire les sujets britanniques nés ou naturalisés." See farther art. 14 of the C. C. P. of L. C., in these words: " All foreign corporations or persons, duly authorized under any foreign law to appear in judicial proceedings, may do so before any court in Lower Canada." See also the C. S. L. C., c. 91. In the 3rd volume of the L. C. Rep., p. 76 (1), will be found the judgment of the Superior Court, of the 21st of February, 1853, dismissing the claims of the *Quebec Seminary* against the *Quebec Exchange* for an indemnity in favour of the *Seignior*, founded on the *prétention* that the Quebec Exchange was a *mainmorte*. The authorities in support of the decision will be found in the notes. The same question was decided in the case of *Kierzkowski* vs *Grand Trunk Railway Company of Canada* (2).

(1) La Bourse de Québec, compagnie à fonds social incorporée par le Statut du Bas Canada de 1830, 10 et 11 Geo. 4, ch. 15, intitulé : " Acte pour incorporer la Bourse de Québec," n'est pas une mainmorte, et l'acquisition d'un immeuble faite par cette corporation ne donne pas lieu au droit d'indemnité ou d'amortissement en faveur du seigneur, cette corporation n'étant pas perpétuelle et n'étant pas frappée de l'incapacité d'aliéner et différant essentiellement à cet égard de la mainmorte. (*Séminaire de Québec* vs *Bourse de Québec*, C. S., Québec, 21 février 1853, BOWEN, J. en C., et DUVAL, J., 3 *D. T. B. C.*, p. 76)

(2) Par la section 1 du ch. 25 des Statuts du Canada de 1845, 8 V., intitulé : " Acte pour incorporer la compagnie du chemin à lisses (Rail-Road) du Saint-Laurent et de l'Atlantique," "*la compagnie du chemin à lisses (rail-road) du Saint-Laurent et de l'Atlantique*" fut incorporée avec *succession perpétuelle*, sous ce nom, et autorisée à faire un chemin à lisses (rail-road) appelé " le chemin à lisses (rail-road) du Saint-Laurent et de l'Atlantique," depuis le fleuve Saint-Laurent, aussi à l'opposite de la ville de Montréal qu'il serait jugé nécessaire, dans la direction générale de Saint-Hyacinthe et de Sherbrooke, jusqu'à la ligne frontière entre la province et les Etats-Unis d'Amérique, à tel point ou lieu de ladite ligne frontière près de la rivière Connecticut où ledit chemin à lisses (rail-road) pourrait plus convenablement joindre le chemin à lisses du Saint-Laurent et de l'Atlantique qui devait être construit depuis Portland, dans l'Etat du Maine, jusqu'à ladite ligne frontière, pour y joindre le chemin à lisses (rail-road) dont la construction était autorisée par cet acte, et, en outre, cette compagnie fut autorisée à faire un chemin à lisses (rail-road) partant d'aucun point de celui autorisé par cet acte qui serait jugé le plus avantageux et allant à ladite ligne frontière, dans le township de Stanstead, ou ailleurs dans le comté de Stanstead, dans le but de le réunir à tout chemin à lisses (rail-road) qui pourrait être construit dans l'Etat du Vermont, un des Etats-Unis d'Amérique. Par la même section, la compagnie fut aussi autorisée à acquérir des terrains pour l'usage du chemin, "*sans lettres d'amortissement de Sa Majesté ; sauf cependant pour le seigneur ou les seigneurs dans la censive desquels les terres, tenements et héritages ainsi acquis seront situés, ses ou leurs divers droits d'indemnité respectifs, et tous*

It cannot escape remark that the law which denies plaintiffs' right of action to recover back the purchase-money paid, if correctly laid down by the present judgment, would be equally conclusive against the company, if the action were brought to get possession of the land, so that Desbarats might retain

autres droits seigneuriaux quelconques." Par la section 2 du même acte, la compagnie fut autorisée à construire une branche de chemin à lisses depuis la rive sud du fleuve Saint-Laurent, aussi à l'opposite de la ville de Québec qu'il serait jugé nécessaire, jusqu'au dit chemin à lisses (rail-road) en aucun lieu dans cette province. Le ch. 25 des Statuts du Canada de 1845, 8 Vict., fut amendé par le ch. 79 des Statuts du Canada de 1846, 9 Vict., intitulé: "Acte pour amender l'acte d'incorporation de la compagnie du chemin à lisses du Saint-Laurent et de l'Atlantique;" par le ch. 65 des Statuts du Canada de 1847, 10 et 11 Vict., intitulé: "Acte pour amender l'acte incorporant la compagnie du chemin à lisses du Saint-Laurent et de l'Atlantique, et pour étendre les pouvoirs de ladite compagnie;" par le ch. 176 des Statuts du Canada de 1849, 12 Vict., intitulé: "Acte pour amender l'acte pour incorporer la compagnie du chemin à lisses du Saint-Laurent et de l'Atlantique;" par le ch. 118 des Statuts du Canada de 1850, 13 et 14 Vict., intitulé: "Acte pour amender de nouveau l'acte pour incorporer la compagnie des chemins à lisses du Saint-Laurent et de l'Atlantique, et autres actes relatifs à ladite compagnie, et pour étendre les pouvoirs de ladite compagnie," et par le ch. 47 des Statuts du Canada de 1852, 16 Vict., intitulé: "Acte pour amender un acte passé dans la huitième année du règne de Sa Majesté, pour incorporer la compagnie du chemin de fer du Saint-Laurent et de l'Atlantique, et pour étendre les pouvoirs de ladite compagnie." Le 10 août 1850, fut passé le ch. 116 des Statuts du Canada de 1850, 13 et 14 Vict., intitulé: "Acte pour incorporer Peter Patterson, Ecuyer, et autres, sous le nom de "La compagnie du chemin de fer de Québec et Richmond;" et, par cet acte, cette compagnie ainsi incorporée fut autorisée à faire un chemin de fer appelé "Le chemin de fer de Québec et Richmond," à partir de quelque endroit du fleuve Saint-Laurent, aussi en face de la cité de Québec qu'il serait jugé désirable, jusqu'à la rivière Saint-François, dans le village de Richmond, ou auprès, dans le township de Shipton, en suivant une ligne aussi droite qu'on pourrait le trouver avantageux, pour là en faire la jonction avec le chemin de fer du Saint-Laurent et de l'Atlantique. Le 30 août 1851, la législature de la province du Canada, déclarant qu'il était de la plus haute importance pour le progrès et le bien-être de cette province, qu'une ligne de grand tronc de chemin de fer fut construite dans toute sa longueur, et depuis la frontière Est d'icelle, à travers les provinces du Nouveau-Brunswick et de la Nouvelle-Ecosse jusqu'à la cité et port d'Halifax, passa le ch. 73 des Statuts du Canada de 1851, 14 et 15 Vict., intitulé: "Acte pour pourvoir à la construction d'un grand tronc de chemin de fer qui traversera toute l'étendue de cette province." Par cet acte (section 2) le gouvernement du Canada fut autorisé à construire conjointement avec les provinces de la Nouvelle-Ecosse et du Nouveau-Brunswick un chemin de fer de quelque point vis-à-vis de la cité de Québec, jusqu'à la cité de Halifax, dans la Nouvelle-Ecosse, ou à construire sans ces provinces, la partie dudit chemin de fer située dans le Bas-Canada. Par la section 4, il fut autorisé à construire, comme ouvrage provincial, toute la ligne de grand tronc de chemin de fer depuis la cité de Québec, ou quelque point vis-à-vis de cette cité, jusqu'à la cité de Hamilton ou quelque autre point convenable sur la ligne du grand chemin de fer occidental. Par la section 14, il fut décrété que les commissaires des travaux publics, avec le consentement du gouverneur en conseil, auraient plein pouvoir de traiter et convenir avec la compagnie du chemin de fer du Saint-Laurent et de l'Atlantique pour l'acquisition ou l'usage de la totalité ou de toute partie de son chemin de fer, droits et propriétés qu'il serait trouvé expédient d'adopter comme partie de ladite ligne de grand tronc de chemin de fer, et de payer la somme dont il pourrait être convenu à cette compagnie comme compensation pour tel chemin de fer ou partie d'icelui, droits ou propriétés. Par la section 15 il fut statué que, si le gouvernement

both the land and the purchase-money. In the above remarks I omitted to note that a trading company having purchased mining property, might convey it away, by sale or otherwise, at its pleasure. Of this right no doubt can be entertained, and it disposes of the objection raised on the ground of *in-*

ne pouvait réaliser les fonds nécessaires pour la construction de ladite ligne de grand tronc de chemin de fer, il pourrait déclarer qu'il pourrait être entrepris par toute compagnie privée à ce autorisée par la législature. Par le ch. 148 des Statuts du Canada de 1851, 14 et 15 Vict., intitulé : "Acte pour incorporer la *compagnie du chemin de fer de Toronto et de Guelph*," cette compagnie ainsi incorporée fut autorisée à faire un chemin de fer depuis les eaux du lac Ontario, dans les limites de la cité de Toronto, jusqu'à la ville de Guelph, dans le comté de Waterloo. Par le ch. 37 des Statuts du Canada de 1852, 16 Vict., intitulé : "Acte pour incorporer "la compagnie du Grand-Tronc de chemin de fer du Canada," cette compagnie ainsi incorporée fut autorisée à faire un chemin de fer appelé "le Grand-Tronc de chemin de fer du Canada," depuis la cité de Toronto, à travers les villes de Port Hope, Cobourg et Belleville, jusqu'à la cité de Kingston, de là, par la route qu'elle trouverait la plus convenable par les villes de Brockville et Prescott, jusqu'à un point sur la ligne frontière est du township d'Osnabruck, et de là, en une ligne aussi droite que possible, jusqu'à Saint-Raphaël, et de là jusqu'à la rivière des Outaouais, et traversant ladite rivière jusqu'à un point entre le lac des Deux-Montagnes et le village de Sainte-Anne, et de là, jusqu'à la cité de Montréal, en suivant la ligne que ladite compagnie pourrait trouver la plus avantageuse. Par le ch. 38 des Statuts du Canada de 1852, 16 Vict., intitulé : "Acte pour pourvoir à l'incorporation d'une compagnie pour construire un chemin de fer depuis vis-à-vis Québec jusqu'aux Trois-Pistoles, et pour étendre ledit chemin de fer jusqu'à la frontière de la province," l'incorporation par proclamation de "la compagnie du Grand-Tronc de chemin de fer du Canada-Est" fut autorisée ; et cette compagnie à être ainsi incorporée fut autorisée à faire un chemin de fer appelé "*le Grand-Tronc de chemin de fer du Canada-Est*," depuis quelque point sur le chemin de fer de Québec et Richmond, vis-à-vis ou presque vis-à-vis la cité de Québec, sur la rive sud du fleuve Saint-Laurent, jusqu'aux Trois-Pistoles. Le 10 novembre 1852 fut passé le ch. 39 des Statuts du Canada, 16 Vict., intitulé : "Acte pour autoriser toute compagnie de chemin de fer dont le chemin de fer forme partie de la ligne du Grand-Tronc de chemin de fer de cette province, à se joindre à toute autre compagnie de même nature ou à acheter la propriété ou les droits d'aucune dite compagnie ; et pour abroger certains actes y mentionnés pour incorporer des compagnies de chemin de fer." Le préambule de ce statut contient la déclaration suivante : "Attendu qu'il serait avantageux à cette province que la ligne de Grand-Tronc de chemin de fer qui doit la traverser dans toute sa longueur, fut sous le contrôle et administration d'une seule compagnie ou d'un aussi petit nombre de compagnies différentes que possible." Par la section 1 de ce statut, il fut décrété qu'il serait loisible à deux ou à un plus grand nombre de compagnies formées ou qui seraient ci-après formées aux fins de construire un chemin de fer qui formera partie de la ligne du Grand-Tronc de chemin de fer qu'avait en vue la législature en passant l'acte 14 et 15 Vict., ch. 73, de se réunir en une seule compagnie, ou à aucune desdites compagnies d'acheter et acquérir la propriété et les droits d'une ou de plusieurs desdites compagnies ; et que les dispositions de cet acte s'appliqueraient et comprendraient la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique, et tout le chemin de fer que cette compagnie était autorisée à construire. Par la section 2 de ce statut il est décrété "qu'il sera loisible aux directeurs de toute compagnie, comme susdit, de convenir avec les directeurs de toute autre compagnie ou compagnies, que les compagnies qu'ils représentent respectivement seront réunies comme une seule compagnie, ou que l'une desdites compagnies achètera et acquerra la propriété et les droits, et assumera toutes les obligations de l'une ou des autres ; et dans ladite convention, ils fixeront les conditions auxquelles ladite union ou ledit achat se fera, les droits que les actionnaires de chaque

aliénabilité attaching to real property in the hands of *gens de mainmorte.* As to the right of the company to sue the *arrière-garant,* see 1 Troplong, *Contrat de vente,* n° 437, and the authorities there referred to."

compagnie possèderont après ladite union ou achat." La section 3 pourvoit à la ratification de telles conventions par les actionnaires. Par la section 4, il est statué "que, depuis et après le temps auquel une convention ratifiée pour l'union de deux ou d'un plus grand nombre de compagnies, aura force et effet, les compagnies qui devront être réunies, deviendront une seule compagnie et une seule corporation, sous le nom de corporation à elle assigné dans ladite convention, qui aura et possèdera tous les droits et propriétés, et sera soumise à toutes les obligations des compagnies respectives, parties à ladite convention, et sera considérée comme étant la même corporation que chacune d'icelles." Par la section 8 il est statué "que, dans le cas de toute telle union, comme susdit, le capital de la compagnie formée en conséquence sera égal aux capitaux réunis des compagnies unies." Par la sec. 11 du ch. 41 des Statuts du Canada de 1852, 16 Vict., intitulé : "Acte pour amender l'acte qui incorpore *La compagnie du chemin de fer de Toronto et de Guelph,* décrète que ladite *compagnie du chemin de fer de Toronto et de Guelph* est autorisée à prolonger son chemin de fer depuis la ville de Guelph à travers le village de Stratford jusqu'aux eaux de la rivière Saint-Clair au port de Sarnia. Par le chapitre 43 des Statuts du Canada de 1852, 16 Vict., intitulé : "Acte pour incorporer *la compagnie du grand chemin de fer de jonction,*" cette compagnie ainsi incorporée fut autorisée à faire un chemin de fer sur ou à travers aucune des trois sections suivantes, c'est à savoir, sur et à travers aucune partie du pays situé entre Belleville et Peterborough,et conduisant de ladite ville de Peterborough, vers le sud-ouest, à la cité de Toronto, ou à quelque point à l'est de ladite cité de Toronto, de manière à rencontrer la ligne du Grand-Tronc de chemin de fer dont la construction était projetée, et aussi de Peterborough susdit, ou quelque point à l'ouest de Peterborough sur la section qui précède, jusqu'à tel endroit sur le lac Huron que fixerait ladite compagnie. Par le ch. 75 des Statuts du Canada de 1853, 16 Vict., intitulé : "Acte pour pourvoir à la construction d'un pont général de chemins de fer sur le fleuve Saint-Laurent, à ou près la cité de Montréal" la compagnie du Grand-Tronc de chemin de fer du Canada ou toute autre compagnie qui sera formée par l'union de ladite compagnie avec une ou plusieurs compagnies de chemin de fer en vertu de l'acte passé à cette fin, a plein pouvoir et autorité de construire un pont de chemin de fer qui sera appelé et connu pour être le "*pont Victoria,*" sur le fleuve Saint-Laurent, entre quelque point situé dans la cité ou la paroisse de Montréal, au-dessus de l'endroit connu sous le nom de "Ruisseau Migeon," et quelque point situé dans la paroisse de Longueuil ou dans la paroisse de Laprairie de la Magdeleine, et pour construire sur les deux rives dudit fleuve et dans les limites de ladite cité, ou d'aucune des paroisses ci-dessus mentionnées, tels chemins de fer d'embranchement, quais, terrassements, jetées, stations, plans inclinés et autres ouvrages de toute description qui pourront être nécessaires pour rendre commode l'usage dudit pont, ou le relier avec tout chemin venant dans ladite cité ou quelqu'une des paroisses susdites, ou pour la sûreté ou protection dudit pont ou desdits ouvrages, ou pour accomplir toute condition qui sera imposée par le gouverneur en conseil en vertu des dispositions dudit acte. Par le ch. 76 des Statuts du Canada de 1853, 16 Vict., intitulé : "Acte pour étendre les dispositions de l'acte d'union des compagnies de chemin de fer, aux compagnies dont les chemins croisent la ligne du Grand-Tronc ou touchent à des endroits où touche également ladite ligne," les dispositions du ch. 39 des Statuts du Canada de 1852, 16 Vict., furent étendues à toute compagnie de chemin de fer dont le chemin de fer croise la ligne du Grand-Tronc de chemin de fer projeté par la législature dans le ch. 73 des Statuts du Canada de 1851, 14 et 15 Vict., ou touche à quelque cité, ville ou place où touche également la ligne du Grand-Tronc de chemin de fer projeté. Par un acte de convention passé à Londres, en Angleterre, en date du 12 avril 1853, fait sous les dispositions du ch. 39 des Statuts du Canada de

LORANGER, J. *ad hoc*, dissenting: On a soulevé en cette instance la question vivement débattue en ce pays, et décidée dans la négative en 1859, par la Cour d'Appel, dans la cause de Kierskowski et la Compagnie du Grand Tronc, de savoir si les sociétés industrielles et commerciales à fonds commun, éri-

1852, 16 Victoria, la compagnie du Grand-Tronc de chemin de fer du Canada-Est, la compagnie du chemin de fer de Québec et Richmond, la compagnie de chemin à lisses du Saint-Laurent et de l'Atlantique, la compagnie du chemin de fer de Toronto et Guelph, et la compagnie du grand chemin de fer de jonction, ont été unies et incorporées avec ladite compagnie du Grand-Tronc de chemin de fer, sous le nom de "*La compagnie du Grand-Tronc de fer du Canada.*" Il fut stipulé, dans cette convention qui a été ratifiée et confirmée par les actionnaires de ces diverses compagnies, que les différents chemins de fer et ouvrages desdites compagnies, y compris ledit pont général des chemins de fer sur le Saint-Laurent, à Montréal, appelé le pont Victoria, formeront à l'avenir un seul chemin de fer et ouvrage qui sera connu sous le nom de *Le Grand Tronc de chemin de fer du Canada.* Par la 3ème clause de cet acte d'union, il est déclaré que "le capital de la compagnie unie consistera dans le montant réuni des capitaux respectifs que les diverses compagnies formant telle union peuvent avoir prélevés ou ont été autorisées à prélever sous l'autorité des divers actes du parlement relatifs à telles compagnies respectivement, avec augmentation de tel capital réuni, qui de temps à autre pourra être faite sous les dispositions des clauses de l'acte refondu des chemins de fer. Cette convention approprie ensuite certaines actions de la compagnie unie aux actionnaires de chacune de corporations contractantes, et, par la 5ème clause, elle oblige la compagnie unie à se charger, comme des dettes de la compagnie unie, du paiement de la somme de £75,000, étant le montant calculé dû aux actionnaires de la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique. Par cet acte de convention, il est aussi déclaré que le capital et les actions de la compagnie du Saint-Laurent et de l'Atlantique deviendront capital et actions au même montant nominal dans la compagnie unie. Cette convention fut ratifiée et confirmée par le ch. 33 des Statuts du Canada de 1854, 18 Vict., intitulé: "Acte pour amender les actes relatifs à la compagnie du Grand-Tronc de chemin de fer du Canada;" et, par la sec. 3 de cet acte, la compagnie unie formée par l'union des différentes compagnies ci-dessus mentionnées fut désignée sous le nom de la compagnie du Grand-Tronc de chemin de fer du Canada, et les différents chemins de fer ou ouvrages entrepris et construits par elles furent connus et désignés sous le nom de Le Grand-Tronc de chemin de fer du Canada. Par cet acte de convention ainsi ratifiée, on a formé de tous les capitaux de ces compagnies un seul capital.

Jugé:—La compagnie du Grand-Tronc de chemin de fer du Canada, telle que constituée par le ch. 33 des Statuts du Canada de 1854, 18 Vict., est un ouvrage d'utilité publique et n'est pas, en loi, une corporation de mainmorte sujette au paiement de l'indemnité seigneuriale pour les acquisitions d'immeubles par elle faites pour ses fins, et les terrains possédés par cette compagnie ne sont pas des terrains tenus en mainmorte. Même, si la compagnie du Grand-Tronc de chemin de fer du Canada devait être considérée comme une compagnie de mainmorte, elle ne serait pas tenue de payer au seigneur une indemnité au sujet de la cession ou vente par la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique, vu que cette dernière compagnie avait déjà payé une indemnité au seigneur pour les terrains acquis par elle et cédés à la compagnie du Grand-Tronc de chemin de fer du Canada, cette dernière étant soustraite à cette obligation par la sec. 34 du ch. 3 des Statuts du Canada de 1854, 18 Vict., intitulé: "Acte pour l'abolition des droits et devoirs féodaux dans le Bas-Canada," laquelle se lit ainsi qu'il suit: "Tous fonds sur lesquels des droits d'indemnité ont été payés à un seigneur, et qui n'ont pas été vendus ou concédés depuis tel paiement à des personnes possédant autrement qu'en mainmorte, sont par le présent déclarés être, et avoir été du jour de la date de tel paiement ou de tout acte ou contrat par écrit obligeant tel propriétaire à payer tels droits, déchargés de toutes redevances et charges

gées en corporations politiques, sont des mainmortes soumises aux restrictions de la Déclaration de 1743, relativement à l'acquisition immobilière. Dans l'espèce présente, la cour de première instance a jugé dans l'affirmative, en déboutant la compagnie appelante, mais, à mon sens, ce jugement est repro-

seigneuriales, et tenus en franc-aleu roturier, mais sujets au paiement d'une rente constituée, égale aux cens et rente légalement dus sur iceux. (*Kierskowski* et *Cie du Grand-Tronc de chemin de fer du Canada*, C. B. R. en appel, Montréal, 9 décembre 1859, LAFONTAINE, J. en C., (dissident), AYLWIN, J., DUVAL, J., MEREDITH, J., dissident, et A. LAFONTAINE, J., confirmant le jugement de C. S., Montréal, 30 novembre 1857, SMITH, J., dissident, MONDELET, J., et BADGLEY, J., 4 J., p. 86; 8 D.T.B.C., p. 3; 10 D.T.B.C., p. 47; 6 R. J. R. Q., pp. 93 et 124, et 8 R. J. R. Q., p. 492). Le juge en chef Lafontaine exprima l'opinion que la compagnie du Grand-Tronc de chemin de fer du Canada, ayant succession perpétuelle, et ayant le droit d'acquérir des immeubles pour les fins de son chemin devait être considérée comme une corporation de mainmorte; la déclaration de Louis XV enrégistrée au Conseil Supérieur, à Québec, reconnaissant ce caractère de mainmorte non seulement à des corps et communautés ecclésiastiques, mais encore à des corps et communautés laïques, et il s'appuya sur la sec. 13 du ch. 48 des Statuts du Canada de 1859, intitulé: "L'acte d'amendement seigneurial de 1859", pour soutenir que les corporations devaient être considérées comme gens de mainmorte. Cette section se lit comme suit: "Tout immeuble tenu en mainmorte, ou par une corporation, dans les parties desdites seigneuries qui se trouvent dans la cité et la paroisse de Montréal comme il est dit plus haut, et dont la tenure n'est pas déjà commuée, sera commué dans le cours des vingt années qui suivront la passation du présent acte, et s'il n'est commué volontairement, le droit de commutation sur icelui, calculé et constaté en la manière prescrite par ladite Ordonnance et sous les dispositions du présent acte, deviendra dû audit séminaire et sera garanti sous les mêmes privilèges que le droit de commutation mentionné dans la section précédente." Le juge en chef exprima aussi l'opinion que la s. 34 du ch. 3 des Statuts du Canada de 1854, qui a été sanctionné le 18 décembre 1854, n'avait pas d'effet rétroactif et ne s'appliquait pas à la convention du 12 avril 1853. Le juge Meredith exprima l'opinion que, dans le droit anglais, ainsi que dans le droit français, les gens de mainmorte sont tous les corps et communautés tant ecclésiastiques que laïques qui sont perpétuels, et qui, par une subrogation de personnes, étant censés toujours les mêmes ne produisent aucune mutation par mort, et que tout titre qui transfère l'immeuble à un propriétaire qui ne peut point aliéner, ou qui ne meurt point, donne ouverture au droit d'indemnité.

Jugé:—L'acte de convention du 12 avril 1853 est de fait un acte translatif de propriété et a opéré l'aliénation ou le transport de la propriété des biens de la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique, vu que, avant et au temps de la convention, lesdits biens appartenaient exclusivement à ladite compagnie de chemin de fer du Saint-Laurent et de l'Atlantique, tandis qu'après la date et la mise à effet de cette convention et en vertu d'icelle, ces biens sont devenus la propriété d'une autre corporation distincte, savoir la compagnie du Grand-Tronc de chemin de fer du Canada. Cet acte équivaut à vente quant aux £75,000 que la compagnie du Grand-Tronc de chemin de fer s'est obligée de payer pour les actionnaires de la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique, vu que les parties à cette convention, en obligeant la compagnie du Grand-Tronc de chemin de fer du Canada à payer cette somme de £75,000 à la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique, ont admis, de fait, que les biens cédés par la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique excédaient de ce montant, en valeur, les actions de la compagnie du Grand-Tronc de chemin de fer du Canada, auxquelles les actionnaires de la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique avait droit en vertu de cette convention; mais cette convention n'est pas équipollente à vente quant aux actions dans la compagnie du Grand-Tronc de chemin de fer du Canada,

chable, non parce qu'il a résolu, comme il le fait, la question que les intimés lui ont soumise, mais en motivant sur sa solution l'irrécevabilité de la demande; car, à mon avis encore, cette question ne se présentait pas. Je m'explique. Le 24 novembre 1863, George Desbarats vendit à Foley une propriété minière située dans le canton de Watford. Prix $20,000 payées comptant. Le 25 novembre, le lendemain, Foley revendit cette propriété à la compagnie appelante, The Chaudière Gold Mining Company of Boston, un corps politique incorporé en vertu des lois de l'Etat de Massachusetts pour des fins d'exploitation minière. Prix $200,000, payées également au comptant. La compagnie allègue ces faits, et ajoute qu'ayant ainsi acquis de bonne foi et se croyant en sûreté sur ses titres, elle a dépensé $30,000 en frais d'exploitation; que, quand Desbarats a vendu, il n'était pas propriétaire, n'ayant jamais eu de titre à la propriété qui était restée à la Couronne, laquelle l'a concédée le 5 mars 1867, à Thomas McGreevy qui en a pris possession, et elle réclame de la succession Desbarats $230,000 pour indemnité. Par une défense en droit, les intimés ont plaidé, entre autres moyens, que la corporation demanderesse, corporation étrangère, n'allègue pas qu'elle ait eu le droit d'acquérir des propriétés immobilières en cette Province de Québec, et que, comme corporation étrangère (et mainmorte), la compagnie appelante n'a pu acquérir de propriétés immobilières en cette

auxquelles les actionnaires de la compagnie du chemin de fer du Saint-Laurent et de l'Atlantique avaient droit en vertu de cette convention, vu que ces actions étaient reçues en échange de leurs actions dans la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique. Cette convention n'est pas non plus équipollente à vente quant aux dettes de la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique, dont s'est chargée la compagnie de Grand-Tronc de chemin de fer du Canada, vu que lesdites dettes doivent être considérées comme formant un montant qu'on doit déduire de la valeur de l'actif transféré comme capital par la compagnie du Saint-Laurent et de l'Atlantique à la compagnie du Grand-Tronc de chemin de fer du Canada, et vu que l'obligation par ladite compagnie du Grand-Tronc de chemin de fer du Canada de payer ces dettes était, aux termes de la sec. 4 du ch. 39 des Statuts du Canada de 1852, 16 Vict., une conséquence nécessaire de l'union desdites deux compagnies, union qui n'est pas considérée comme une vente par ledit statut qui a permis l'union de plusieurs compagnies, ce qui a été fait, ou la vente des propriétés d'une compagnie à une autre, ce qu'on n'a pas jugé à propos de faire. La compagnie du Grand-Tronc de chemin de fer du Canada n'étant qu'une corporation privée, et non un corps public agissant pour l'Etat, et ayant droit aux privilèges incidents aux contrats faits par l'Etat pour des fins d'utilité publique, est donc en conséquence tenue de payer au seigneur les lods et ventes sur une vente dont le prix est de £75,000. (*Kierskowski* et *Cie du Grand-Tronc de chemin de fer du Canada*, C. B. R. en appel, Montréal, 9 décembre 1859, LAFONTAINE, J. en C., AYLWIN, J., dissident, DUVAL, J., MEREDITH, J., et A. LAFONTAINE, J., dissident, infirmant le jugement de C.S., Montréal, 23 novembre 1857, SMITH, J., dissident, MONDELET, J., et BADGLEY, J., 4 J., p. 86; 8 D. T. B. C., p. 3; 10 D. T. B. C., p. 47; 6 R. J. R. Q., pp. 93 et 124, et 8 R. J. R. Q., p. 492). Le juge Meredith exprima l'opinion que la convention du 12 avril 1853 constituait une société entre les compagnies unies, mais une vente quant aux £75,000.

province, et ne peut réclamer de dommages des intimés à raison de la vente faite par leur auteur Foley, laquelle est nulle et de nul effet. La cour de première instance accueillit ce moyen, et débouta l'appelante. Si la demande eut été intentée pour obtenir la délivrance de l'immeuble, peut-être le vendeur eut-il pu invoquer la nullité de la vente, comme faite à une mainmorte et affectée de nullité d'ordre public: mais peut-on douter que, dans l'hypothèse de cette nullité, il eut pu se refuser à la restitution du prix? Ici, la demande est pour dommages résultant non de la non-délivrance de l'immeuble, mais de la vente faite par le vendeur du bien d'autrui. L'action exercée ici n'est pas l'action *exempto*. Elle n'est pas intentée par l'acquéreur immédiat, mais par un second acheteur, qui, usant du bénéfice de la cession de droits de garantie contre le premier vendeur, cession virtuellement renfermée dans la seconde vente, réclame une indemnité plus forte que le prix originaire reçu par le premier vendeur, il est vrai, mais qui le renferme essentiellement. Laissant de côté cet excédant du prix originaire, c'est-à-dire le surplus du prix payé par la compagnie à Foley sur ce que ce dernier a payé à Desbarats, et les frais d'exploitation de la compagnie qu'elle réclame par forme de dommages, supposons que la compagnie eut limité sa demande à la répétition de la somme de $20,000, prix de la première vente (et cette supposition est parfaitement légitime et s'adapte complètement à la situation légale des parties sur la défense en droit, car un plaidoyer de ce genre ne peut être maintenu qu'autant qu'il s'applique à la demande entière, et il est indifférent pour le faire rejeter que la demande contienne une plus pétition, si elle est fondée en droit pour une partie), supposons, dis-je, que l'action eut été originairement pour le premier prix de vente, et par Foley lui-même au lieu de l'être par son cessionnaire, est-ce que la nullité de la vente eut pu être l'objet d'une défense en droit? Le demandeur eut-il pu dire, votre déclaration ne révèle pas un droit d'action contre moi, parce que le prix que vous répétez a été le prix d'une vente affectée de nullité. Depuis quand le vendeur du bien d'autrui, et qui a reçu le prix, peut-il en refuser la restitution, sous le prétexte d'une nullité quelconque dont la vente aurait été affectée? Dans l'espèce, ce n'est pas la nullité de la vente à Foley que Desbarats invoque, mais c'est de celle de Foley à la compagnie. La distinction est de nulle importance et ne touche en rien à la question de responsabilité du vendeur, ainsi qu'elle vient d'être posée. Quel intérêt imaginable peut avoir Desbarats, vendeur payé de la chose d'autrui, à dire à la compagnie: "J'ai vendu, il est vrai, une chose qui ne ' m'appartenait pas, j'ai reçu le prix que vous répétez, mais je ' ne vous le rendrai pas, parce que mon acquéreur, se croyant

" de bonne foi, maître de la chose quand il l'a revendue, l'a " revendue à une mainmorte qui n'avait pas le droit de l'ac- " quérir." Encore une fois, si la compagnie, étant une mainmorte et n'ayant pas le droit d'acquérir l'immeuble, ce qu'il n'y a pas lieu d'examiner, en demandait la délivrance, cette défense pourrait peut-être valoir, car Desbarats pourrait dire à l'appelante : " la loi qui vous défend d'acquérir des immeubles et vous en dénie la possession, repousse votre demande en délivrance. Foley est resté vis-à-vis moi l'acquéreur de la mine, et si j'en dois à quelqu'un la délivrance, c'est à lui et non à vous que je la dois." Ainsi caractérisée, je comprendrais la défense que, dans l'espèce, je ne puis concevoir. Il est au demeurant un moyen fort simple d'élucider la question ; supposons que la compagnie, s'apercevant que Foley lui avait vendu une chose qui n'était pas sienne, par défaut de titres en la personne de Desbarats, eût réclamé de lui (Foley) son prix de vente purement et simplement, et qu'il eût appelé Desbarats à garantir, ce dernier plaidant pour Foley, eût-il pu invoquer la déclaration de 1743, et les prohibitions qu'elle contient pour repousser la demande principale ? Qui oserait le soutenir ? Autant vaudrait dire que Foley lui-même pouvait invoquer cette prohibition, ce qui n'entrerait dans l'esprit de personne. En effet, le vendeur qui a participé à une vente nulle par défaut de capacité d'acquérir en la personne de l'acquéreur doit la restitution du prix en vertu de la maxime que personne ne peut s'enrichir au préjudice d'autrui : *Jure naturæ æquum est neminem cum alterius detrimento et injuria fieri locupletionem.* Il la doit s'il est de bonne foi, et, dans le cas contraire, il la doit encore en vertu de la même règle de droit, supportée par cette autre que nul ne peut profiter de sa fraude : *Nemo ex suo delicto meliorem suam conditionem facere potest.* Ici la compagnie n'a pas recherché Foley, et Desbarats n'a pas été mis en cause comme garant. Il l'a été directement et comme partie principale par la compagnie pour éviter un circuit d'actions qu'elle avait droit d'épargner. Sur cette demande, la situation des parties contendantes était absolument la même qu'elle l'eût été dans l'hypothèse posée de la double demande ; puisque ce n'est qu'à la condition que les rôles de demandeur principal et de garant soient, sur l'action directe, les mêmes qu'ils seraient sur l'action double, que cette action directe est permise, et qu'en ce cas seul la loi dispense d'un circuit inutile. Le défendeur Desbarats n'avait donc pas plus de droit dans une hypothèse que dans l'autre. Pour ces motifs, je suis d'opinion que la question de mainmorte sur laquelle je ne me prononce pas, quand même elle serait résolue en un sens favorable aux intimés, ne pouvait leur offrir un moyen valable de défense en droit, et je suis d'avis d'infirmer le jugement. Il est

d'ailleurs une autre objection hostile au jugement. L'édit de 1743 ne rend pas absolument nulles toutes les acquisitions faites par des mainmortes. Elles ne peuvent acquérir qu'avec permission souveraine. Ne peut-on pas dire ici que cette permission était matière de preuve, et qu'elle ne devait pas nécessairement être l'objet d'une allégation de la déclaration dont l'absence fut fatale à l'action ? Ce dernier considérant est cependant subsidiaire.

CARON, J. : Toute la question paraît se réduire à savoir si la compagnie appelante est une mainmorte, ou bien une simple association commerciale ordinaire. Avant tout, voir la cause du *Séminaire de Québec* vs *La Bourse de Québec*, rapportée au 3ème volume des Lower Canada Reports, page 76, et *suprà*, p. 304. Il faut aussi remarquer que nous avons un statut provincial qui permet aux compagnies étrangères de poursuivre dans nos cours. L'audition qui a donné lieu au jugement dont est appel, a été sur un *demurrer*, produit par les défendeurs à l'action. La question décidée par le jugement est de savoir si une corporation de la nature de celle qui porte la présente action, a droit, d'après notre loi, d'acquérir des biens immeubles dans la Province, sans la permission de la Couronne ou l'autorité de la Législature. Le jugement qui nous est soumis a décidé la question dans la négative et a renvoyé l'action des appelants. L'intimé, pour soutenir le bien jugé, réfère à l'Edit ou Déclaration de 1743, (1er vol. Edits et Ordonnances, p. 576) fait exprès pour le Canada et enregistré au Conseil Supérieur ; cet édit, suivant l'intimé, a toujours été comme regardé en force dans le pays jusqu'à la promulgation du Code, ainsi que l'ont décidé les tribunaux dans plusieurs espèces qu'ils citent. Or, à la clause première, il y est statué qu'aucun établissement ou fondation ne sera fait dans le pays, sans la permission expresse de la Couronne. La clause dix défend à toute communauté religieuse ou autre gens de mainmorte d'acquérir des immeubles, sans lettres patentes de la Couronne ; et par la clause vingt-unième, cette défense est faite à peine de nullité. S'il est vrai que, lors de l'achat fait par les appelants, la loi ci-dessus était encore en force, et s'il est vrai aussi que les demandeurs sont gens de mainmorte, dans le sens qu'on l'entendait sous le droit ancien, la conclusion est que l'acte de vente sur lequel ils fondent leur action, est nul et ne peut donner lieu en leur faveur, à aucune demande pour dommages ou autres causes. Que les corporations de la nature de celle qui poursuit, soient mainmortes d'après le droit ancien, la chose n'est pas douteuse. Pour se satisfaire à ce sujet, il ne faut que référer au Répertoire *Guyot*, v° *Mainmorte*, page 97 ; *Dictionnaire de Droit*, v° *Mainmorte*. Notre statut, chap. 91 S. R. B. C., qui permet aux corporations étrangères de poursuivre devant nos tribu-

naux, ne change en rien la loi ancienne, quant au droit d'acquérir des immeubles. Nos propres corporations n'ont ce droit d'acquérir des immeubles, qu'autant qu'il leur est accordé; aussi, dans chaque acte d'incorporation, trouve-t-on la clause nécessaire à cet effet; or, si nos corporations n'ont pas ce droit sans autorisation, il serait absurde de prétendre que les étrangères l'aurait plutôt que les nôtres. La cause du Séminaire de Québec contre La Bourse de Québec, dont il a été fait mention, n'est pas applicable au cas actuel. Ce n'était pas le titre de la Bourse qui était contesté; il n'était pas prétendu que cette corporation n'avait pas le droit d'acquérir; au contraire, son acte d'incorporation lui accordait ce droit; mais la question était, quant au droit du Séminaire, comme seigneur, de réclamer indemnité sur cette acquisition. C'est justement parce que la Bourse avait, par son acte d'incorporation, le droit d'acheter et vendre des immeubles que l'action du Séminaire a été renvoyée. Je suis enclin à croire que le jugement est correct, et je le confirmerais.

BADGLEY, J.: Assuming appellants to be the foreign corporation which they have qualified themselves to be, established and created in a foreign country by the law of that country only, it must be observed that, by the provincial statute law of Lower Canada, C. S. L. C., chap. 91, secs 1 and 2, foreign corporations are allowed the general comity right to sue and be sued in our provincial courts of justice, but this permissive right to use those courts does not confer upon such corporations, the powers, capacities and privileges granted by our local law to our own legally constituted corporations, nor relieve the foreign bodies from the declared disabilities of our law. The law of the foreign country under which the foreign corporation is constituted is a merely local law, and cannot extend or be extended beyond its own territory, and, hence, when such corporations reach beyond the country which establishes them and contract in a country foreign to that of its creation, *ex. gra.* this province, they are at once subject to our public law which regulates the extent of their contracting power and becomes paramount over the foreign creative law erecting them into bodies corporate and over their foreign charter of incorporation. In these respects they, like all domestic corporations, are upon a different footing to natural persons. Corporations are creatures of limited powers, and are not, and never can be citizens of the country; they are artificial creations, being only in contemplation of law, and have no other attributes than those which the law confers upon them, or suffers them to enjoy or exercise and, hence, as the law of their establishing country has no extra territorial operation, a foreign corporation, merely as such, cannot challenge, as

matter of right, the privilege of dealing in a country not under the sovereignty which created it. Its being a trading corporation does not alter the principle applicable to corporations in general, although the Crown or the Provincial Legislature may confer corporate powers locally effective even upon foreign corporations, whilst it is competent for the Provincial Legislature to affix upon all corporations such conditions upon their powers as may be deemed expedient and politic, although such conditions are not imposed upon citizens, and from these conditions, foreign corporations can of right claim no exemption. Instances of these prohibitive conditions are shewn in the public law, forbidding banking business by corporations unless legally authorized, and such prohibition covers foreign as well as domestic corporations, and, hence, therefore, the essential requisite of the authority of the Crown or of the Provincial Legislature to give such bodies a legal existence. Without these requisites, corporations have no legal recognition, no legal status as bodies politic in courts of justice, and fatal as these objections are to domestic corporations, they are doubly so to foreign ones, because the interdictions of our public law, or public policy expressed by that law, are not to be qualified by the laws or charter grants of a foreign country, and, therefore, become not only positive disqualifications against foreign corporations, but, moreover, are notice to the corporations themselves, and likewise to those who deal with them, as well within the province as without it, when they contravene the public interdictions. In such cases the contravention is fatal, and that objection applies fully to this action. Besides this general objection of public law, our special local law has been imported into this contention, and cannot be passed over unnoticed. The paramount authority of our local law over all corporations and their erection in this province is unquestionable, whether those corporations are of domestic or foreign origin, as well as over the powers and capacities granted to them. As to the foreign bodies, this law applies absolutely, as well in respect of its foreign constituting law as of the charter powers by that law granted to those bodies, because our Local Legislature has absolute power to forbid corporations to do certain acts, or to make certain transactions, altogether, or under certain conditions, and to impose such disqualifications upon them as the Legislature may direct and subjecting those bodies to be brought within the disqualifications of the law. These are legal truisms which need no citations from books to give them support. Assuming, then, the limited local existence and capacity of foreign corporations in this province, it seems plain that the statutory permission extended to them to sue and be sued in our courts of justice, with reference to transactions in

which they are interested, does not relieve them from the necessity of shewing their legal possession of the rights and privileges of our local law to give validity and effect to those transactions which they use our courts to enforce or defend, and so equally, on the other hand, must they shew that they suffer none of those disabilities and disqualifications which our law imposes upon all corporations under certain circumstances. Now, the 3rd chapter of our Civil Code which was legislatively adopted and proclaimed and promulgated to be our municipal law, and as such declared to be in existence, declares the law applicable to corporations generally in this province, confers upon them express rights and privileges, and subjects them to special and positive disabilities. It is not necessary to refer to the former, but for the latter, the disabilities, the 364th art of the Code enacts: "Corporations are subject to "particular disabilities which either prevent or restrain them "from exercising certain rights, powers, privileges and func-"tions, which natural persons may enjoy and exercise; these "disabilities arise either from their corporate character or they "are imposed by law." The 366th article then declares the disabilities arising from the law, and amongst them, those mentioned in the 2nd subsection of the article, namely "those "comprised in the general laws of the country respecting mort-"mains and bodies corporate, prohibiting them from acquiring "immovable property or property so reputed, without the "permission of the Crown, except for certain purposes only, "and to a fixed amount and value." It is scarcely necessary to observe that the exceptions of this sub-article do not apply in this case. These provisions of the Code are positive enactments, and are not promulgated as new law, but are given as declaratory of the old law of the province, which expresses not alone the general law, but likewise the public policy of the province in regard to institutions of this nature; and it is common khowledge that no provincial act or charter of incorporation, by the Legislature, of religious or secular bodies, has been granted, without the legislative permission being provided therein for their acquisition and alienation of real property. The royal permission of the old French law in force, or its equivalent, the modern legislative charter, is by the Code and authoritatively declared to be the general law of the province for corporations in general, and without the royal or legislative permission all corporations are prohibited from acquiring such real property. Whatever doubts might have existed heretofore as to the prohibitive applications of the old law, with reference to merely trading corporations they have disappeared since the promulgation of the Code, which has declared those old law prohibitions to be and to

have been our provincial law. The terms of the Code article are too plain for a doubtful construction, and in their generality embrace all corporations, secular, lay or trading, and subject them all to the same disqualifications to acquire real property, without the royal or legislative permission first had and obtained. This general law of the country, as by the 2nd subsection above respecting both mortmainors and bodies corporate, is to be found originally in the Ordinance of Louis XV of 1743, which was duly registered as municipal law in Canada at the time, and has never been abrogated or repealed, and which the code by its statutory enactment now assimilates with and applies to the law of corporations and bodies politic in general, extending beyond the religious and eleemosynary institutions of the ordinance. The modern corporation did not exist and was not referred to by the ordinance, but our declaratory Code has extended the ordinance disqualifications to the modern body politic corporation, trading or otherwise, and bound it in the politic prohibitive terms of the old law. The public policy of the ordinance against publicly unsanctioned and unpermitted acquisitions of real property within the province is the prevailing public policy of our law, binding upon all corporations, and strictly holding this corporation at the date of the execution of their indenture and deed of conveyance to them by Foley. Positive law as well as state policy prohibited the acquisition by the corporation of the lots of land set out in the indenture, and the corporation and their vendor could not, *ex mero motu*, of both or of either dispense with and set aside the statutory disqualifications of our state policy or public law. Pothier, *Traité des personnes*, referring to the French Edit of 1749 for France, in this respect similar to that of 1743 above, from which the former was in part copied, says that the incapacity to acquire by *communautés*, (mortmainors) was absolute, and they could not acquire *à quelque titre que ce soit, soit à titre gratuit, soit à titre de commerce*, not even in payment of a debt, nor could notaries give their ministry to pass such deeds; power being reserved to the King alone to accord permission to acquire immoveables, &c. It results from all these circumstances that this foreign corporation is not known to the law as a natural person; that it cannot of right claim the exercise of the rights and privileges of natural persons; that it cannot acquire or hold immovable property in this province in its own name, without royal or legislative permission therefor first had and obtained, and could, therefore, suffer no legal eviction from what it could neither acquire nor hold against a positive prohibitory law in accordance with public policy against such acquisition or tenure; and, therefore, could claim or demand

no damages by reason of its own breach of the law and of public policy, and of its privation of illegally acquired provincial real property. Courts of justice may sustain a contract by a foreign corporation, but only when they can enforce it agreeably to the rules of the law which the courts are bound to administer, and not in the peculiar manner of a foreign state, which is unknown to and of no force within the jurisdiction of the adjudging court. The objection of the demurrer is, therefore, also absolute against this corporation under the provisions of our local law. The remaining objection to be noticed is that the corporation shows no legal right of direct recourse against respondents, as the alleged *arrière-garants* of the corporation, through Foley, their immediate vendor and purchaser from Desbarats, whom respondents represent. The judgment appealed from, after considering that the appellants were a foreign corporation, by our provincial law under disability to acquire our provincial lands without sanction of the Crown or authority of the Legislature, and that the appellants show no right or title to the lands described in the declaration, considering, therefore, that they are not founded in their action of damages against the respondents as representing their alleged *arrière-garant*, the late George Desbarats, maintained the *défense au fond en droit*, and declare valid, &c., dismiss the action with costs. Upon this it must be observed, that the corporation claiming that the damage alleged to have been suffered by them from the enhanced value of the lots of land at the time when the corporation had been evicted from them, and which value they have estimated at $250,000, as already observed, does not rest upon any privity existing at any time directly between the parties to this suit, but, resting specially in this point upon the article of the Practice Code, they take their direct recourse beyond their privity with Foley, their vendor, against the respondents as the *arrière-garants*. The article applies precisely and specifically *en matière de garantie formelle*, and in such matter only *arrière-garants* may be proceeded against directly, but here there could be no *garantie formelle*, no real rights acquired by the corporation, except those acquired against the prohibitions of public policy and the disabilities of the law, whilst the terms of both the original and the second deeds of sale referred to in the declaration contain no such warranty. Without a legally acquired real property, there can be no formal warranty, except by express stipulation to that effect, which would then be a personal contract by the guarantor enforceable directly against him, but not reaching over to his vendor without also a similar express stipulation in his favor by the latter. Now, none of all this

appears in the declaration and, instead, it shews a purchase by the corporation, the appellants, from Foley in defiance of law and public policy, and therefore entirely and absolutely null and void in its legal effects against the respondents without special warranty by the respondents. No real right, no *garantie formelle*, is involved in this cause. A speculative loss of an alleged enhanced value of the property by them purchased from Foley is claimed from the respondents, and it is claimed as a personal loss to this foreign unauthorized corporation ; but this is not the matter of the *garantie formelle* of the 126th article C. P. C., upon which this action is made to rest. The legal disability above referred to is affixed upon this corporation, and their demand cannot be enforced by the local courts without setting aside the prohibitions of the law and of public policy which these courts are bound to administer and sustain. The recourse of the appellants in some way may be against Foley, but is not against the respondents, and their appeal should therefore be rejected.

The following laws were referred to in the case : " Edith of the King of France in 1743 (1). Art I : " Voulons, conformément aux ordonnances rendues et aux règlements faits pour l'intérieur de notre royaume, qu'il ne puisse être fait dans nos colonies de l'Amérique, aucune fondation ou nouvel établissement de maisons ou communautés religieuses, hôpitaux, hospices, congrégations, confréries, collèges ou autres corps et communautés ecclésiastiques ou laïques, si ce n'est en vertu de notre permission expresse, portée par nos lettres patentes, enregistrées en nos Conseils Supérieurs desdites colonies, en la forme qui sera prescrite ci-après." Art. X : " Faisons défenses à toutes les communautés religieuses et autres gens de mainmorte, établis dans nosdites colonies, d'acquérir ni posséder aucun bien immeuble, maisons, habitations ou héritages situés auxdites colonies ou dans notre royaume, de quelque nature ou qualité qu'ils puissent être, si ce n'est en vertu de notre permission expresse, portée par nos lettres patentes enregistrées en la forme prescrite ci-après, dans nosdits Conseils Supérieurs, pour les biens situés aux colonies, et dans nos Cours de Parlement, pour les biens situés dans notre royaume ; ce qui aura lieu, à quelque titre que lesdites communautés ou gens de mainmorte prétendent faire l'acquisition desdits biens, soit par vente volontaire ou forcée, échange, donation, cession ou transport, même en paiement de ce qui leur serait dû, et en général pour quelque cause gratuite ou onéreuse que ce puisse être. Voulons que la présente disposition soit observée nonobstant toutes clauses ou dispositions générales, qui auraient été

(1) See Code de la Martinique (1807) vol. 1, p. 474.

insérées dans les lettres patentes ci-devant obtenues pour autoriser l'établissement desdites communautés, par lesquelles elles auraient été déclarées capables de posséder des biens-fonds indistinctement." Art. XXI: "Tout le contenu en la présente déclaration sera observé à peine de nullité de tous contrats et autres actes qui seraient faits sans avoir satisfait aux conditions et formalités qui y sont prescrites, même à peine d'être lesdites communautés déchues de toutes demandes en restitution des sommes par elles constituées sur des particuliers ou payées pour le prix des biens qu'elles acquerraient sans nos lettres de permission; voulons en conséquence que les héritiers ou ayants cause de ceux à qui lesdits biens appartenaient, même leurs enfants ou autres héritiers présomptifs de leur vivant, soient admis à y rentrer, nonobstant toute prescription et tous consentements exprès ou tacites qui pourraient leur être opposés." Edict of the King of France in 1749 (1). Art. I: "Voulons qu'il ne puisse être fait aucun nouvel établissement de chapitres, collèges, séminaires, maisons ou communautés religieuses, même sous prétexte d'hospices, congrégations, confréries, hôpitaux, ou autres corps et communautés, soit ecclésiastiques séculières ou régulières, soit laïques de quelque qualité qu'elles soient, ni pareillement aucune nouvelle érection de chapelle, ou autres titres de bénéfices, dans toute l'étendue de notre royaume, terres et pays de notre obéissance, si ce n'est en vertu de notre permission expresse portée par nos lettres patentes." Art. IX: "Voulons que tous les actes et dispositions qui pourraient avoir été faits en leur faveur, directement ou indirectement, par lesquels ils auraient acquis des biens de quelque nature que ce soit, à titre gratuit ou onéreux, soient déclarés nuls sans qu'il soit besoin d'obtenir des lettres de rescision contre lesdits actes." Art. XIV: "Faisons défenses à tous les gens de mainmorte d'acquérir, recevoir ni posséder à l'avenir aucuns fonds de terre, maisons, droits réels, rentes foncières non rachetables, même des rentes constituées sur des particuliers, si ce n'est après avoir obtenu nos lettres patentes pour parvenir à ladite acquisition et pour l'amortissement desdits biens." Civil Code of Lower Canada, arts 358, 364, 366, 1506, 1507, 1508, 1509, 1510. *Consolidated Statutes of Canada* (1859), ch. 63, sec. 8: "Any company incorporated under this act may, in their corporate name, purchase, hold and convey any real or personal estate, or movable or immovable property necessary to enable the company to carry on the operations mentioned in such statement or declaration; but no such company shall mortgage the same, or give any lien thereon."

(1) Isambert's Anciennes Lois Françaises, vol. XXII, p. 227.

EDDIS, Q. C., WATKIN WILLIAMS, Q. C., and F. W. GIBBS, for appellants: The main question in the Court of Queen's Bench was whether the corporation could acquire lands in Lower Canada. Now this is not an ordinary corporation, but is a trading corporation. Its whole object is to carry on the business of mining, and this could not be done without holding real estate in some way. Art. 358 of the C. C. says that "the rights which a corporation may exercise, besides those specially conferred by its title, or by the general laws applicable to its particular kind, are all those which are necessary to attain the object of its creation." Thus, the mining corporation is not affected by the disabilities declared by sect. 2 of art. 366 of the C. C. Under the general law of France the company could hold lands; the Edict of 1743 does not refer to a commercial company, but only to religious corporations. Trading corporations are not *gens de mainmorte*, for their lands can be sold again; and it is not contrary to public policy that a trading corporation should be in possession of lands for a time in order to develop their resources. See *Les Messieurs du Séminaire* vs *La Bourse de Québec* (1); *Kierzkowski* vs *Grand Trunk Railway Company* (2). Moreover, c. 63, sect. 8, of the C. S. L. C., enables a body of proprietors on registration to become a company and to hold lands. Even if the company could not hold lands, they were not restricted from acquiring them. However, we submit that the right of action of appellants does not depend on their capacity to acquire lands in Lower Canada; and it was not necessary for them to allege any such capacity in their declaration. The action is a personal one for damages. Respondents are estopped from asserting the disability of appellants to acquire lands. No doubt the Crown had a right to declare the lands forfeited; but the contract of the company to purchase the lands was merely voidable, and not void. With regard to the warranty, this question was not raised in the pleadings; a legal warranty against eviction is always implied in a contract of sale (art. 1508 of C. C.), and this is not excluded by the insertion of the conventional warranty against mortgages, &c. The fact of the corporation being a foreign one does not affect the question, as by art. 25 of the C. C. L. C., aliens have a right to acquire and transmit movable and immovable property in Lower Canada; and by art. 14 of the C. C. P. L. C., foreign corporations may appear in judicial proceedings in Lower Canada. See also *Dutch West India Company*

(1) 3 Low. Can. Rep., p. 76, and *suprà*, p. 304.

(2) 4 Low. Can. Jur., p. 86, and *suprà*, p. 304.

vs *Moses* (1); *Newby* vs *Von Oppen and The Colts Patent Firearms Manufacturing Company* (2); *American Mutual Life Insurance Company* vs *Owen* (3). The case being decided upon demurrer, it ought to be assumed, until the contrary is shewn, that everything was done by the company to enable them to hold lands in Lower Canada: *Society for the propagation of the Gospel* vs *Wheeler* (4).

BENJAMIN, Q. C., and WESTLAKE, for respondents: If appellants have obtained the permission of the Crown to acquire and hold lands, it ought to be alleged in the declaration. No action will lie against respondents; there was no warranty of title by Desbarats, and the law supplies a warranty against eviction only in cases where there is no express warranty; but the insertion of a warranty here shews that it was the intention of the parties to exclude the implied warranty: *Chambers* vs *Davidson* (5). (See C. C. L. C., arts 1506-10). Appellants had no capacity to acquire lands in Lower Canada. After the Edict of 1743, corporations could acquire, but not hold lands; after the Edict of 1749 they were prohibited from acquiring; 9 *Pothier, Traité des Personnes*, pt. 1, tit. 7, n° 219, p. 82. Moreover, by the C. C., art. 366, they are expressly prohibited from acquiring immovable property. The prohibition was not confined to religious corporations, but extended to corporations of all kinds. That being so, appellants could not bring an action on a contract for the sale of lands.

Their Lordship's judgment was now delivered by Sir MONTAGUE E. SMITH: This is an appeal from a judgment of the Court of Queen's Bench for Lower Canada, affirming a judgment of the Superior Court of the Province, which dismissed the appellants' action. The action was brought by them, as vendees of mining property in Lower Canada, on an alleged warranty of title, not against Foley, their immediate vendor, but against respondents as the representatives of Foley's vendor, George Desbarats, who was, as they allege, liable as *arrière-garant* (remote warrantor), by virtue of article 126 of the Code of Civil Procedure. The case was decided upon a demurrer to the declaration, and, consequently, upon the facts disclosed in it. The appellants are there described as "The Chaudière Gold Mining Company, of Boston, in the State of

(1) 1 Str., 612.

(2) Law Rep., 7 Q. B., 293.

(3) 15 Gray's Mass. Rep., 491.

(4) 2 Gallison's American Rep., 105.

(5) Law Rep., 1 P. C., 296.

Massachusetts, one of the United States of America, a body politic and corporate, duly incorporated under the laws of the said State of Massachusetts, for the purpose of and now actually carrying on the business of a mining company there, and at the township of Watford, in the county of Dorchester, and elsewhere, in the Province of Quebec." The declaration sets out a deed of sale of the 24th November, 1863, whereby, for the price of 20,000 dollars, Desbarats sold to Foley some lots of land which are stated to have been assigned to him by several persons described as "original grantees of the Crown;" but the deed, at the same time, discloses that patents from the Crown had not then been obtained. The declaration then sets out a deed of sale of the 25th November, 1863, from Foley to appellants, whereby, for the price of 200,000 dollars, Foley sold to appellants the same lots of land, but, by a description which not only does not state that the patents had not issued, but from which it might be implied that they had been granted. Desbarat's deed of sale contains an express warranty of a limited kind. Foley's deed has a warranty in different terms. It is proposed to refer more particularly to these warranties hereafter. The declaration then alleges that the lands were Crown lands which had not been granted to any person at the date of the deeds, and that neither Desbarats nor Foley had ever got "the titles or patents to the lands," and avers that the lots were afterwards granted by Letters Patent of the Queen to McGreevy, by whom Appellants were evicted. It was contended, on behalf of respondents, that, by the law of Lower Canada, corporations could not acquire land or an interest in it without the licence of the Crown, and, as a consequence, were not competent to maintain an action on a real warranty against a remote warrantor. It was further contended that, if this were not so, Desbarats had given an express warranty, which excluded the implied general warranty against eviction, and that this limited obligation gave no title to Foley, or to appellants as his vendees, to maintain this action. For appellants it was answered that the disabling law did not apply to trading corporations, whether foreign or domestic; and, further, that if it did embrace them, such corporations were not incapacitated from acquiring, but only from holding lands, and that in either view their action was maintainable; and it was denied on their part that the ordinary legal warranty against eviction arising upon contracts of sale was excluded by the terms of Desbarats' deed. In the view their Lordships take of this case, it will not be necessary for them to determine the status and rights of foreign corporations in Lower Canada, or to what extent, if at all, they differ from corporations established in the colony. The law of the province deals

liberally with foreigners. By the Civil Code, article 25, aliens have the right to acquire and transmit movable and immovable property in the same manner as British-born or naturalized subjects; and by the Code of Civil Procedure, article 14, foreign corporations may appear in all judicial proceedings in the colony. Whatever may be the effect of these articles, it is sufficient to say that appellants cannot be in a higher or better position than a colonial corporation would be; and their Lordships, therefore, without further reference to the above distinction, will proceed to consider the principal question discussed by the judges in the courts below, viz. the capacity of mining or trading corporations to acquire lands in the colony. By the old law of France and her colony, before the Edicts of Louis XV, issued in 1743 in the colony, and in 1749 in France, corporations might acquire lands, but could not hold them without licence from the Crown, if required to give them up. But these edicts, which appear to be substantially to the same effect, incapacitated corporate bodies from acquiring as well as holding lands. This distinction is very clearly stated by Pothier, vol. 9, "Traité des Personnes," tit. 7, art. 1, n° 215, p. 80. He says: "Dès avant l'édit de 1749, les communautés n'étaient pas à la vérité incapables d'acquérir des héritages; mais si elles pouvaient les acquérir, elles n'étaient pas en droit de les retenir toujours. Elles pouvaient être obligées de vider leurs mains de ces héritages, soit par les seigneurs, de qui les héritages acquis par elles relevaient; soit par le procureur du roi, à moins qu'elles n'eussent obtenu du roi des lettres d'amortissement, qui les rendissent capables de posséder et retenir ces héritages, en indemnisant les seigneurs." He then explains that the right of the King to oblige corporations "à vider leurs mains de ces héritages" was founded on reasons of public policy, and that of the seigniors on their title to receive profits upon mutation of the lands on death and otherwise. Pothier, vol. 9, n°s 219 et 220, p. 82, further says: "L'Edit de 1749 a rendu les communautés absolument incapables d'acquérir aucuns héritages, comme fonds de terre. Les choses qu'il est défendu par cette loi d'acquérir, ne peuvent être par elles acquises à quelque titre que ce soit, soit à titre gratuit, soit à titre de commerce." The prohibitory force which the learned author ascribes to the edict seems to be amply justified by the terms of it. It was not denied by the counsel for the appellants that Pothier had properly declared the effect of the edict upon corporations with which it dealt; but they contended that these were religious and eleemosynary bodies only, and that modern trading corporations were not within its scope. There can be little doubt that the main object of the edicts was to discourage

the excessive endowment of religious houses, but the Edict of 1743 has words large enough to include secular bodies also. Article 1, after enumerating particular corporations, has the general description, "*autres corps et communautés ecclésiastiques ou laïques.*" And the prohibition to acquire lands contained in art. 10 is directed against "autres gens de mainmorte" as well as religious bodies. It was argued that trading corporations could not be deemed "gens de mainmorte," because their lands were not withdrawn from commerce, and were alienable. But the withdrawal of lands from commerce was only one, and not the main reason of the law of mortmain, which was founded, as plainly appears from Pothier, not only on considerations of public policy, but on the loss to the Lords of their seignorial rights. Their Lordships, however, cannot consider it to be their duty, at this day, to construe the language of the edict as alone containing the law of Canada on the subject of mortmain, because a legislative declaration of that law is, in their opinion, contained in the Code, which is free from ambiguity. Tit. XI of the first book of the Code, which treats of "Corporations," in terms includes every kind. Art. 364 states: "Corporations are subject to particular disabilities which either prevent or restrain them from exercising certain rights, powers, privileges and functions, which natural persons may enjoy and exercise; these disabilities arise either from their corporate character or they are imposed by law." The disabilities arising from the law are stated in art. 366, as follows: "1° Those which are imposed on each corporation by its title, or by any law applicable to the class to which such corporation belongs; 2° Those comprised in the general laws of the country respecting mortmains and bodies corporate, prohibiting them from acquiring immovable property or property so reputed, without the permission of the Crown, except for certain purposes only, and to a fixed amount and value." The article refers, not to the edict, but "to the general laws of the country respecting mortmain," and their Lordships think that it declares the disabilities which attach by the general law of mortmain to all corporations without distinction. It may here be observed that this view of the Code is affirmed by the majority of the judges in the Court of Queen's Bench in the present case, and is not denied by the two dissenting judges. Mr. Justice BADGLEY refers to the Code in his judgment as follows: "Whatever doubts might have existed heretofore as to the prohibitive application of the old law with reference to merely trading corporations, they have disappeared since the promulgation of the Code, which has declared those old law prohibitions to be and to have been our provincial law. The terms of the Code article

are too plain for a doubtful construction, and in their generality embrace all corporations (secular, lay, or trading), and subject them all to the same disqualifications to acquire real property, without the royal or legislative permission first had and obtained." These observations on the declaratory force of the Code are entitled to great weight, from the fact that Mr. Justice BADGLEY was one of the judges who, in a case relied on by the appellants (Kierzkowski *v.* Grand Trunk Railway Company, 4 Lower Canada Jurist 86, and *suprà p.* 304), expressed an opinion that trading corporations were not "gens de mainmorte." In that case, however, the railway company had legislative powers to purchase lands, and the question arose incidentally in an action for seignorial dues. Whatever may be the worth of the opinions expressed in that case, the higher authority of the Code must now prevail. Their Lordships, for these reasons, think the Court of Queen's Bench was right in holding that the appellants were incapable, without the licence of the Crown, which it is not averred they possessed, to acquire any title to the lands sold to them by Foley. But before considering the effect of this disability on their right to maintain the present action, it will be convenient to advert to the nature and extent of the warranty upon the sale by Desbarats to Foley, of which the appellants are seeking to avail themselves. By the law of France prevailing in the colony a warranty against eviction is implied in contracts of sale, but it is permitted to derogate from it by contract. Pothier says: "Le droit commun des contrats de vente, qui oblige le vendeur envers l'acheteur à la garantie de la chose vendue, ne concernant qu'un intérêt particulier des acheteurs, il est permis aux parties de déroger à ce droit par conventions particulières" (vol. 3, Traité du Contrat de Vente," Part 2, chap. 1, sect. 2, art. 7, p. 77, n° 181). The author then gives instances of conventions having this effect; one of them being n° 183: "Celle par laquelle le vendeur stipule qu'il ne sera garant que de ses faits." The Code of Lower Canada, in effect, embodies this law. Article 1506 declares that the warranty to which the seller is obliged in favour of the buyer is either legal or conventional. Legal warranty is defined in art. 1508, and includes warranty against eviction by reason of any right existing at the time of the sale. Articles 1507, 1509 and 1510 declare the manner in which this warranty may be excluded or diminished, as follows: Art. 1507: "Legal warranty is implied by law in the contract of sale without stipulation. Nevertheless parties may, be special agreement, add to the obligations of legal warranty, or diminish its effect, or exclude it altogether." Art. 1509: "Although it be stipulated that the seller is not obliged to any warranty, he is nevertheless obliged to a warranty against

his personal acts. Any agreement to the contrary is null." Art. 1510: "In like manner, when there is a stipulation excluding warranty, the seller in case of eviction is obliged to return the price of the thing sold, unless the buyer knew at the time of the sale the danger of eviction or had bought at his own risk." By the deed of sale Desbarats expressly bound himself and his heirs to warrant and guarantee Foley against all mortgages, debts and dowers whatever. There is no other express warranty. The terms of transfer are limited to the rights and interests Desbarats had or could demand in the subject matter of the sale. It is evident that the eviction by the Crown is not a breach of the express warranty given by Desbarats. His liability for this eviction must, therefore, be founded, if it exists at all, on legal warranty. It was insisted on the part of the respondents that the legal warranty was excluded by the conventional warranty upon the ordinary rule of construction, *expressum facit cessare tacitum*. It is true that the conventional warranty of Desbarats does not contain the word "only," or other equivalent expression; but it seems to be a reasonable, if not a necessary implication from the insertion of a limited conventional warranty, that it was the intention of the parties to exclude the larger legal one, and this implication is strengthened by the peculiar form of the conveyance, and by the disclosure in the deed of the fact that patents had not then been granted by the Crown; a disclosure which was not made in the conveyance by Foley on his sale to the appellants, for a price which was an enormous increase on that he had paid to Desbarats. There appears, then, to their Lordships to be strong ground for holding that the legal warranty was excluded on Desbarats' sale; and that no action could have been maintained by Foley against Desbarats upon an eviction by the Crown; and if this is so, none can be maintainable against him by the appellants for such eviction, even if they had been under no disability; because, in suing Desbarats as a remote warrantor, they can have no greater remedy against him than their immediate warrantor, Foley, to whose rights they are in effect subrogated by the operation of article 126 of the Code of Civil Procedure. It is not, however, necessary to rest the decision on this ground, because, assuming the legal warranty not to have been excluded on the sale by Desbarats to Foley, their Lordships think that the legal disability to purchase lands under which appellants are placed prevented them from acquiring the right to resort to it. Such a right can only spring from a valid sale, and the sale from Foley to them being invalid, by reason of their incapacity to purchase, the consequential right to sue Desbarats on a legal warranty could never arise. What-

ever may be the case, as between Foley and appellants, it is evident that Desbarats, who was not a party to that sale, is not estopped from asserting its invalidity. The Chief Justice of the Court of Queen's Bench was of opinion that, although the appellants might be under a legal disability to purchase, the action was maintainable against Desbarats for the price as upon a failure of consideration. But this opinion appears to have been given upon the erroneous assumption that Desbarats had received the price paid on the sale by Foley, viz. 200,000 dollars, from the appellants. The right to restitution of the price is independent of warranty and can be enforced, as it appears to their Lordships, only between the immediate parties to a sale. Art. 1510 of the Code declares this right: "In like manner, when there is a stipulation excluding warranty, the seller in case of eviction is obliged to return the price of the thing sold, unless the buyer knew at the time of the sale the danger of eviction or had bought at his own risk." By the terms of this article it is only when warranty is excluded the that this obligation to return the purchase money as between the immediate parties to the sale arises; and it cannot, therefore, be within article 126, C. P. C., which is confined to the case of warranties. Their Lordships in deciding this appeal are dealing only with the action brought under this article against Desbarats, and not with the rights (if any) which the appellants may have against their immediate vendor, Foley, either on his express engagements or for restitution of the price paid to him. One other point remains to be noticed, viz. the contention on the part of the appellants that, although it is not averred in the declaration that the license of the Crown had been obtained, the grant ought, upon demurrer, to be assumed until the contrary was shown by plea. Their Lordships cannot agree in this view. On the face of the declaration the appellants were incorporated by the law of a foreign state, and were, according to what has been already decided, under a legal disability by the general law to acquire lands in Canada. Assuming that this disability might have been removed by a license from the Crown, it appears to their Lordships that it was for the appellants to show it, since this license was essential to confer on them the legal capacity to purchase and to maintain the action. The grant also, if obtained, would be a fact peculiarly within their own knowledge, and ought, according to a reasonable rule of pleading, to have been averred by them. This pleading point, it may be observed, is entirely beside the substance of the case; for there can be no doubt that, if a license had been really granted, the appellants would have applied and been allowed to amend their declaration and aver its existence. In the result, their

Lordships will humbly advise Her Majesty to affirm the judgment of the Court of Queen's Bench, and to dismiss this appeal with costs. (1 *R. L.*, p. 82 ; 13 *J.*, p. 182 ; 15 *J.*, p. 44 ; 2 *R. L.*, p. 623 ; 4 *R. L.*, p. 645 ; 17 *J.*, p. 275 ; 1 *R. C.*, p. 120 ; 19 *R. J. R. Q.*, p. 244, et 5 *Law R., P. C.*, p. 277)

ACTION NEGATOIRE.—QUESTIONS MUNICIPALES.

COUR DU BANC DE LA REINE, EN APPEL,
Montréal, 9 juin 1868.

Présents : DUVAL, J., CARON, J., DRUMMOND, J., BADGLEY, J.

EDOUARD LEMIRE, appelant, *et* GABRIEL COURCHÊNE, intimé.

Jugé : 1° Que la preuve qu'un inspecteur a juridiction et qualité pour agir comme tel, lorsque la qualité est niée, ne peut se faire que par la production d'un extrait des registres de la municipalité, constatant que sa nomination a été légalement faite ; et que la preuve verbale qu'il est reconnu et qu'il agit comme tel, est insuffisante.

2° Que l'ouverture d'un fossé de ligne entre deux héritages ne doit être ordonnée que lorsque c'est le meilleur moyen d'égoutter ces héritages.

3° Que, dans l'espèce, le moyen le plus avantageux d'égoutter les héritages des parties était la confection d'un cours d'eau de travers réglé par un procès-verbal.

4° Que l'ordre d'un inspecteur d'ouvrir un fossé de ligne doit être considéré comme un jugement établissant une servitude, et doit être rendu par écrit, de manière à régler, comme un procès-verbal, la dimension et le parcours du fossé de ligne.

5° Que l'ordre d'un inspecteur qui ordonne l'ouverture d'un fossé de ligne, lorsque l'égout de l'héritage a été réglé d'une autre manière, est illégal.

6° Que tel ordre est encore illégal lorsque le fossé de ligne est de nature à causer du dommage à l'une des parties.

7° Que l'action négatoire est le recours accordé par la loi pour se prémunir contre le jugement d'un inspecteur, qui, en ordonnant l'ouverture d'un fossé de ligne, a commis une injustice, soit à la forme, en ne procédant pas suivant la loi, soit au fond, en ordonnant des travaux inutiles et dispendieux ou dommageables.

Les deux parties possèdent, à LaBaie, des héritages voisins, dont le front, le long du chemin, s'incline et forme une côte qui se prolonge tout le long de la concession. La maison et les autres bâtisses de l'appelant sont au pied de cette côte ; la maison est située proche de la ligne. Dans le mois d'août 1867, les inspecteurs, Côté et Lemire, ont été requis par un voisin des parties pour légaliser un cours d'eau naturel, formé par la déclivité des terrains et traversant les terres des parties et de leurs voisins, pour aller se jeter dans une petite rivière qui débouche dans le fleuve Saint-Laurent. Les inspecteurs,

après avoir visité les lieux, ont dressé un procès-verbal qui légalisait le cours d'eau naturel et déclarait que le cours d'eau était ainsi légalisé, sur le travers, pour égoutter les terres des parties y concernées, vu qu'il était difficile de les égoutter par des fossés de ligne, lesquels, à cause de la position particulière des lieux, pouvaient entraîner des éboulements dans la côte et causer des dommages. L'intimé, qui voulait un fossé de ligne, s'est opposé à l'homologation, par les juges de paix, de ce procès-verbal, qui cependant a été homologué, et par les juges de paix et par la Cour de Circuit saisie d'un appel porté par l'intimé. Ce dernier n'ayant pu réussir à faire rejeter le procès-verbal, a requis un inspecteur, du nom de Lampron, de faire faire un fossé de ligne. Cet inspecteur s'est rendu sur les lieux et a verbalement donné un ordre général d'ouvrir un fossé de ligne entre les héritages des parties, ordre que l'intimé s'est mis à exécuter, en enlevant les clôtures et en creusant la plus grande partie du fossé de ligne. Sur ce, l'appelant a porté la présente action, sous forme d'action négatoire. Les allégués de l'appelant étaient : 1° Que l'intimé n'avait jamais été autorisé légalement à ouvrir le fossé de ligne en question, et que, conséquemment, son acte était illégal, et ses travaux une empiéetation sur les droits et la propriété de l'appelant ; 2° qu'en supposant que l'intimé aurait été autorisé à ouvrir tel fossé de ligne, par un inspecteur ayant juridiction d'agir comme tel, l'ordre de l'inspecteur était illégal, en autant 1° qu'il était verbal ; 2° qu'il était insuffisant pour créer une servitude, parce qu'il était général et qu'il n'établissait pas la mesure et l'étendue de cette servitude ; 3° qu'il n'avait jamais été signifié à l'appelant ; 4° qu'il contrecarrait et révoquait les dispositions du procès-verbal de Côté et Lemire, qui avait été légalement homologué et qui ordonnait l'égout des héritages des parties par un cours d'eau de travers ; 5° qu'enfin, en supposant que l'intimé aurait été autorisé légalement à ouvrir le fossé de ligne, l'appelant devait être exempté et affranchi de cette servitude, parce qu'elle était inutile, dispendieuse et devait l'exposer à des dommages considérables. A cette action, l'intimé a plaidé : 1° qu'il avait été autorisé légalement à ouvrir le fossé de ligne en question par Louis Lampron Lacharité, inspecteur de clôtures et fossés de la paroisse de Saint-Antoine-de-LaBaie, et : 2° que le fossé de ligne ouvert était en exécution du procès-verbal de Côté et Lemire. L'appelant a prouvé à l'enquête : 1° Que le cours d'eau de travers était bien suffisant pour égoutter les terres des parties, et que le fossé de ligne était inutile pour cela ; 2° que l'ouverture du fossé de ligne annulait les dispositions du procès-verbal, en attirant l'eau du cours d'eau de travers dans le fossé de ligne ; 3° qu'enfin le fossé de ligne exposait l'appelant à des dommages considérables, vu que les crues des

eaux pourraient causer des éboulements dans la côte et entraîner, dans leur chute, les bâtisses de l'appelant. L'intimé a prouvé, par témoins, que Louis Lampron Lacharité était inspecteur pour LaBaie, et qu'il avait autorisé verbalement l'intimé à creuser le fossé de ligne en question. A l'audition, l'appelant a prétendu : 1° Que l'intimé n'avait pas prouvé que Louis Lampron Lacharité était inspecteur, et avait le droit d'agir comme tel ; que la seule preuve légale était la production d'un extrait des registres de la municipalité, constatant la nomination et la légalité de la nomination, conformément aux sous-sections 21 et 22 de la section 20 du ch. 24 de l'acte municipal. 2° Que l'intimé n'avait pas prouvé qu'il avait été autorisé légalement ; que l'ordre verbal de l'inspecteur, en supposant qu'il aurait été donné, était insuffisant, en autant qu'il ne réglait pas la dimension et le parcours du fossé ; que l'ordre de faire un fossé de ligne créait une véritable servitude prédiale, et qu'une servitude, qui est toujours onéreuse, ne peut être créée légalement d'après l'article 549 du Code Civil que par un titre écrit, spécifiant la nature et l'étendue de cette servitude ; que l'ordre d'un inspecteur ordonnant des travaux que les intéressés refusaient de faire volontairement, était un véritable jugement, réglant les droits et devoirs respectifs des intéressés, et qu'un jugement verbal qui n'était pas consigné par écrit, était un non-sens ; que l'ordre en question de l'inspecteur Lampron révoquait virtuellement les dispositions du procès-verbal de Côté et Lemire et que, comme un procès-verbal ne peut être révoqué que par un autre procès-verbal, conformément à la section 36, chap. 26 des Statuts Refondus du B. C., cet ordre de Lampron Lacharité était parfaitement illégal ; que du reste, et pour toutes les raisons ci-dessus énoncées, la preuve orale de tous les faits de la défense était parfaitement illégale et que l'intimé à cause de cela se trouvait sans preuve juridique ; 3° qu'enfin en supposant toutes les raisons ci-dessus énoncées mal fondées en droit, l'appelant devait réussir sur le fond ; qu'il avait été prouvé, au-delà de tout doute, que l'ouverture du fossé de ligne en question était inutile, dispendieuse et surtout exposait l'appelant à des dommages considérables ; que, comme il n'y avait pas d'appel de la décision d'un inspecteur qui, en vertu de la section 31 de l'acte d'agriculture, ordonnait l'ouverture d'un fossé, il devait y avoir un recours contre une injustice que commettait cet inspecteur par une décision absurde et partiale ; que ce recours ne pouvait être que l'action négatoire. De son côté l'appelant prétendait que l'on pouvait faire preuve par témoins qu'un inspecteur était reconnu et agissait publiquement comme inspecteur, et que cette preuve était suffisante pour inférer la juridiction ; que, par la section 31 de l'acte d'a-

griculture, l'inspecteur avait seul juridiction pour ordonner un fossé de ligne et que la loi n'exigeait pas que cet ordre fût par écrit; que l'on ne pouvait se pourvoir par une action négatoire devant la Cour Supérieure pour faire reviser et mettre de côté la décision d'un inspecteur sur le principe que cette décision est erronée et ordonne des travaux inutiles et impropres.

La Cour Supérieure de Richelieu a adopté les vues de la défense, et, en prononçant le jugement, le savant juge LORANGER a remarqué : " Que, bien qu'il n'approuvait pas la décision de l'inspecteur, il ne croyait pas qu'il put maintenir l'action de l'appelant, laquelle demandait, *de plano*, la cassation de la décision de l'inspecteur, et concluait à ce que le demandeur fut affranchi de l'ordre donné par cet inspecteur ; que la section 31 de l'acte d'agriculture donnait positivement à l'inspecteur, seul, juridiction pour faire faire les fossés de ligne ; qu'il ne pouvait substituer son jugement à celui de l'inspecteur, et qu'en le faisant il croirait faire un acte de législation ; que sur les autres points de la cause, il adoptait les vues de la défense."

Le jugement a été rendu dans les termes suivants : " La " cour, considérant qu'il est établi, par la preuve, que c'est " en vertu de l'ordre donné à cet effet par un inspecteur de " clôtures et fossés, savoir Louis Lampron Lacharité, lequel, " par le chapitre 26 des Statuts Refondus du Bas-Canada, " était à ce faire autorisé, que le fossé de la ligne dont se plaint " le demandeur a été creusé par le défendeur, et que le défen- " deur ne pouvait être recherché par la présente demande, " ainsi qu'il l'a été ; l'ordre dudit inspecteur étant sa justifica- " tion légale, a débouté et déboute le demandeur de son action, " avec dépens."

L'appelant a porté appel de ce jugement devant la Cour du Banc de la Reine qui a infirmé celui de la Cour Supérieure.

En prononçant le jugement, le juge CARON, s'est exprimé comme suit : " Plusieurs témoins ont été entendus de part et d'autre, et plusieurs documents ont été produits et prouvés, et, surtout, le procès-verbal invoqué par l'appelant, fait par les inspecteurs Colbert Côté et Hyacinthe Lemire. Sans entrer dans le détail de cette preuve, qui est imprimée au factum, il me paraît clairement établi que l'intimé n'a pas justifié sa défense, ni en fait, ni en droit. En fait, il n'a pas prouvé la qualité d'inspecteur qu'il donne à Lacharité, qualité spécialement niée par le demandeur ; à peine prouve-t-il même, par la preuve verbale, que l'ordre qu'il invoque ait été donné par l'inspecteur ; preuve qui, du reste, est illégale ; mais, surtout, la preuve faite par l'intimé démontre que les travaux dont se plaint l'appelant, loin d'être en exécution du procès-verbal, ont pour effet d'en entraver les dispo-

sitions. Ainsi la preuve de l'intimé est partie insuffisante et illégale et partie contraire à ses prétentions. De son côté, le demandeur me paraît avoir prouvé tout ce qu'il allègue en son action, et cela d'une manière suffisante pour lui donner gain de cause. Par sa preuve, il établit que l'égout des héritages des parties a été régulièrement et légalement réglé au moyen du procès-verbal, lequel homologué et confirmé sur l'appel, ne pouvait être mis de côté que par un autre procès-verbal, et nullement par un ordre verbal, de la nature de celui qu'invoque l'intimé. Cette raison suffit pour donner gain de cause à l'appelant. La contestation entre les parties était légalement réglée par le procès-verbal. Lacharité, fut-il prouvé qu'il était inspecteur ayant juridiction dans l'endroit, ne pouvait pas sommairement, au moyen d'un ordre verbal, détruire l'effet du procès-verbal qui était passé en force de chose jugée entre les parties. Mais, indépendamment de cette objection qui, suivant moi, est fatale, un fait qui ressort de l'enquête de l'appelant, c'est que les dispositions du procès-verbal qu'il invoque sont justes et raisonnables, et règlent, entre les parties, la question de l'égout de leurs terres, de la manière la plus avantageuse, la seule qui soit praticable et sans danger pour l'appelant. Un fossé de ligne ne peut être établi que lorsque c'est le moyen le plus convenable d'égoutter les terres contiguës. Mais, dans le cas actuel, tous les témoins s'accordent à dire que les travaux de l'intimé auront l'effet de renverser les bâtisses de l'appelant, que le mode suggéré par le procès-verbal est plus convenable que l'autre, et que, de fait, il y a malice de la part de l'intimé. Or, l'appelant ne pouvait se pourvoir contre pareille injustice que par l'action négatoire qu'il a portée. Je suis donc avis que le jugement est erroné. Le seul motif sur lequel il est fondé, savoir l'ordre donné par Lacharité, en vertu duquel les travaux ont été exécutés, n'est ni légalement prouvé, ni légal dans sa forme et au mérite, parce que c'est lui supposer un effet qu'il ne peut avoir ; celui d'ordonner verbalement des travaux onéreux, de mettre de côté un procès-verbal homologué, et d'ordonner des travaux inutiles, dispendieux et dommageables. L'action aurait dû être maintenue, et défense faite à l'intimé de continuer les travaux commencés. Le jugement de cette cour ordonne à l'intimé de remettre les lieux dans leur état primitif, antérieur à la voie de fait ; ordonne, de plus, que le procès-verbal de Côté et Lemire sera exécuté, suivant sa forme et teneur, et que l'égout des terres des parties se fera à l'avenir en la manière réglée au procès-verbal. Quant aux dommages, il n'y en a pas eu de prouvés ; cependant nous en accorderons de peu considérables en punition de la voie de fait."

Ci-suit le jugement en appel : " La cour, considérant que, lors

des voies de fait dont se plaint l'appelant, et, longtemps avant, savoir dès le cinq août 1867, l'égout de la portion des terres des parties qui a donné lieu au présent litige, était et avait été réglé par un procès-verbal de cette date, fait par Colbert Côté et Hyacinthe Lemire, inspecteurs de clôtures et fossés pour la localité où sont situées lesdites terres, ledit procès-verbal dûment homologué et confirmé, nonobstant les oppositions réitérées de l'intimé; considérant que, par le procès-verbal, il est ordonné que ladite portion de terre sera égouttée dans le cours d'eau traversant lesdites terres, et non au moyen du fossé de ligne que réclame l'intimé, vu que ce fossé de ligne serait inutile, dispendieux et dommageable à l'appelant; considérant que c'est en violation de ce procès-verbal, et non en exécution d'icelui, ainsi que l'a erronément prétendu l'intimé, qu'il a commencé à creuser ce fossé de ligne, qui lui avait été refusé par les inspecteurs, et qu'à cet effet il a abattu les clôtures communes entre les parties, et fait et commis les autres actes et voies de fait dont se plaint l'appelant; considérant que les procédés de la part de l'intimé ne sont nullement justifiés par l'ordre verbal par lui invoqué, qui aurait été donné par Lampron Lacharité, lequel, sous les circonstances, n'avait aucun droit de donner tel ordre, quand même il aurait été inspecteur de fossés et clôtures pour la localité, qualité qui lui a été donnée et qui n'est pas suffisamment prouvée; considérant que le procès-verbal de Côté et Lemire ne pouvait être mis de côté que par un autre procès-verbal, fait avec les formalités voulues, et qu'il est faux que les prétendus travaux de l'intimé aient été faits en exécution du procès-verbal, mais qu'au contraire, ils l'ont été en violation directe du procès-verbal, sans droit ni autorité quelconques, et sont en réalité une empiétation sur la propriété de l'appelant; considérant que, pour ces raisons, dans le jugement dont est appel, de la Cour Supérieure, siégeant dans la ville de Sorel, en date du vingt-cinq janvier 1868, qui renvoie l'action de l'appelant, il y a erreur, casse et annulle ledit jugement, et, procédant à juger comme aurait dû le faire la cour de première instance, maintient ladite action; fait défense à l'intimé de continuer les travaux qu'il a commencés; lui ordonne de remettre les lieux dans l'état où ils étaient auparavant, et ce, sous quinze jours de la signification du présent jugement, sinon, permis à l'appelant de le faire faire, aux frais de l'intimé; déclare que le procès-verbal de Côté et Lemire sera suivi et exécuté, jusqu'à révocation légale, dans sa forme et teneur; que l'égout des terres des parties se fera à l'avenir en la manière réglee au procès-verbal; et pour les voies de fait commises comme susdit, la cour condamne l'intimé à payer à l'appelant, par forme de dommages, la somme de douze piastres." (1 *R. L.*, p. 158)

OPPOSITION A FIN DE DISTRAIRE.—PROCEDURE.

COUR DU BANC DE LA REINE, EN APPEL,
Montréal, 8 juin 1869.

Coram DUVAL, CARON, MONK, MCKAY et JOHNSON, JJ.

CATHERINE KELLY, appelante, défenderesse en cour inférieure, *et* LE MAIRE ET LE CONSEIL DE LA VILLE DE SOREL, intimés, opposants en cour inférieure, *et* LA BANQUE DU PEUPLE, intimée, intervenante en cour inférieure.

Jugé : Que, lorsqu'une opposition est faite par un tiers à la saisie pratiquée par le demandeur contre les biens du défendeur, et que cette opposition est contestée par toute partie dans la cause, autre que le défendeur, ce dernier a droit d'être notifié de tous les procédés adoptés sur l'opposition, et qu'aucun jugement final ne peut être rendu, pour maintenir telle opposition, à moins que le défendeur ne soit appelé, pour déclarer s'il entend ou non la contester.

LE JUGE CARON : L'immeuble de l'appelante a été saisi à la poursuite des nommés McKay. La corporation de Sorel, prétendant que, dans cet immeuble saisi, était compris une partie d'une ruelle publique appartenant à la municipalité, a fait opposition à fin de distraire, pour réclamer cette partie. La Banque du Peuple, qui avait vendu cet immeuble au mari de l'appelante, est intervenue dans la cause et a, de suite, contesté l'opposition. Issue a été jointe, par la corporation, sur cette contestation. Témoins ont été entendus. Jugement interlocutoire a été rendu, ordonnant la nomination d'un arpenteur pour faire rapport à la cour. Après tout cela, les parties contestantes se sont entendues, la banque et la corporation ont respectivement signé des consentements et admissions, équivalant à une confession de la part de la banque que les prétentions de la corporation étaient bien fondées, et, en conséquence, jugement final a été rendu, accordant les conclusions de l'opposition de la corporation, quant à la distraction qu'elle demandait et la démolition d'un quai faisant partie de l'immeuble saisi, avec dépens contre la banque contestante. Le fait est que ce jugement diminue de beaucoup la valeur de l'immeuble de l'appelante. Cependant, toutes les procédures qui ont eu lieu sur l'opposition, y compris la production de cette opposition, l'intervention de la banque, la preuve faite, l'interlocutoire rendu, les admissions et les consentements donnés, tout, absolument, a été fait sans notification aucune à la partie saisie, savoir l'appelante, laquelle prétend que, quoiqu'elle eût fait défaut sur la demande principale, elle n'en avait pas moins droit d'être notifiée de l'opposition, de l'intervention, de la contestation et de tout ce qui s'en est suivi. Tel est le sujet de son

présent appel, qui ne touche pas à la question du bien jugé. Elle prétend que le jugement doit être infirmé, pour la raison unique du défaut de notification qui vient d'être mentionné. De la part de l'appelante, il a été cité nombre d'autorités, pour établir que la partie saisie a intérêt et a droit aussi d'être notifiée des oppositions produites à la vente des objets saisis sur elle. Les autorités me paraissent raisonnables et applicables à l'espèce. Guyot, Rep. de Jurisp., v° Opposition; 1 Héricourt, Vente des immeubles, page 325: 1 Pigeau, 729; 5 Carré, page 75; Code de Procédure civile, art. 586, 587, 651, 658; 84ième règle de Pratique, C. S. Les citations, et aussi le bon sens, me paraissent s'accorder pour dire que l'appelante a droit de se plaindre du procédé adopté à son préjudice, et sans son intervention. C'est justement parce qu'elle avait fait défaut dans la cause principale, qu'elle aurait dû être notifiée quant à tout ce qui regardait l'opposition. Quel droit avait la Banque du Peuple de renoncer à une partie de son immeuble, et, surtout, à la démolition d'un quai, sans lequel, d'après la preuve, la valeur de la propriété est grandement diminuée. Quand même le jugement serait bon et correct, il ne peut être approuvé, rendu sous de pareilles circonstances. L'intérêt de l'appelante est évident. Plus sa propriété sera détériorée, au moyen de *la distraction ordonnée*, moins elle paiera de ses créanciers, et plus elle demeurera chargée envers eux. Le jugement doit donc être infirmé; ordre doit être donné que le dossier soit renvoyé à la Cour Supérieure, pour que les notifications requises soient faites à l'appelante et toutes les procédures qui ont eu lieu, depuis la production de l'opposition, doivent être déclarées nulles.

Le juge MACKAY: Il est de règle certaine que le jugement qui intervient sur une contestation mue entre certaines parties dans la cause ne peut valoir qu'entre ces parties; c'est le cas actuel. L'appelante n'a pris aucune part dans la contestation soulevée et ensuite arrangée entre la Banque du Peuple et la corporation de Sorel, et cependant, le jugement dont est appel maintient l'opposition des opposants, sans que la cour, qui l'a rendu, se soit occupée de savoir si l'appelante avait quelque chose à dire à l'encontre de cette opposition. Le jugement doit être maintenu entre les parties intimées, qui seules y ont participé, mais doit être déclaré non avenu quant à l'appelante. Cependant chaque partie paiera ses frais. La raison en est que bien que l'appelante avait à la rigueur, le droit d'être notifiée réulièrement de tous les precédés, il est certain que, étant dans la cause, elle n'a pu ignorer ces procédés. Elle aurait dû déclarer qu'elle contestait l'opposition. Son silence équivalait presque, pour les autres parties, à un consentement que le jugement fut rendu comme il l'a été.

Voici l'arrêt : " La cour, considérant que le jugement dont est appel en date du 30 juin 1863, tout en prononçant sur le mérite de l'opposition des intimés, le maire et le conseil de la ville de Sorel, a jugé la contestation liée entre les intimés, seulement, savoir entre le maire et le conseil de la ville de Sorel, opposants en cour inférieure, et la Banque du Peuple, intervenante, à laquelle contestation l'appelante n'a pas été partie, quoique pleinement intéressée dans la matière qui faisait la base de l'opposition, vu que la rue et partie de la maison et du quai dont il est question sont saisies sur l'appelante, à la poursuite des demandeurs, Joseph Mackay *et al.*, dans la cause où elle était défenderesse ; considérant que, dans la cour inférieure, l'appelante aurait dû être notifiée ou appelée, pour déclarer si elle entendait admettre ou contester l'opposition desdits " Le maire et le conseil de la ville de Sorel," mais qu'elle ne l'a pas été, et qu'elle n'a pas eu d'avis de l'opposition ; considérant que, depuis la production de l'opposition en cour inférieure, tous les procédés subséquents à icelle ont été faits sans égard à l'appelante, et cela contrairement aux règles de pratique de la cour supérieure et à la loi ; considérant que la cour inférieure a adjugé sur des droits de propriété très importants pour l'appelante, sans que cette dernière en ait été notifiée, et que ce jugement doit être considéré comme *res inter alios acta*, vis-à-vis de l'appelante ; considérant que l'appelante a droit d'être admise à contester l'opposition dans la cour supérieure du district de Richelieu, et doit encore être admise à ce faire, si elle le juge à propos, sur sa propre motion, ou sur les procédés à être adoptés par ou contre elle, conformément aux errements de la cause et à la pratique de la cour supérieure ; considérant que, en raison des prémisses, les procédés de la cour inférieure, subséquents à la production de l'opposition des intimés " Le maire et le conseil de la ville de Sorel ", doivent être considérés comme non avenus, et d'aucun effet contre l'appelante, et que le dossier doit être remis à la cour inférieure, pour l'adoption entre les parties de tels procédés que de droit sur l'opposition ; la cour, en autant que le jugement dont est appel peut concerner ou affecter les droits de l'appelante, met de côté ledit jugement, et le déclare nul et de nulle valeur, comme étant *res inter alios acta* vis-à-vis de l'appelante, ainsi que tous les procédés subséquents à la production de l'opposition, et ordonne la reprise des procédés en cour inférieure, savoir entre l'appelante et les intimés " Le maire et le conseil de la ville de Sorel," depuis la date de la production de l'opposition en cour inférieure, conformément aux errements de la procédure et à la pratique de la cour supérieure, et ordonne que le dossier soit remis à la cour supérieure, siégeant dans le district de Richelieu, pour y être adoptés

entre l'appelante et les intimés, " Le maire et le conseil de la ville de Sorel " et tous autres y concernés, tels procédés que de droit." (1 *R. L.*, p. 167)

DISTRIBUTION DES DENIERS D'UN INSOLVABLE RESIDANT A L'ETRANGER.

COUR DE REVISION, Montréal, 30 avril 1869.

Coram MONDELET, BERTHELOT, BEAUDRY, JJ.

THE CANADIAN INLAND STEAM NAVIGATION CO., demanderesse, *vs* THE COLUMBIAN INSURANCE CO. OF NEW YORK, défenderesse, *et* LA BANQUE DE MONTRÉAL *et al.*, tiers-saisis; *et* BENAGALE LEFFINGWELL *et al.*, intervenants, *et* GEORGE-A. OSGOOD, intervenant par reprise d'instance.

Jugé: Que des deniers appartenant à un défendeur insolvable, d'après la loi des Etats-Unis, et dont les biens sont en liquidation aux Etats-Unis, ces deniers saisis sur un jugement, et en vertu d'un bref d'exécution de nos cours de justice, entre les mains de tierces personnes résidant dans cette province, doivent être distribués par la cour qui a émané le bref de saisie, suivant les lois de ce pays, et non suivant les lois des Etats-Unis.

MONDELET, J.: Appel d'un jugement rendu par la Cour Supérieure de Montréal (MONK, J.) le 30 mai 1868, renvoyant l'intervention. La question en litige est la même que celle qui a été décidée, au terme dernier, dans la cause de *Steele et al.* and *The Columbian Insurance Company of New-York*, et les mêmes parties que dans la présente cause. Les intervenants, qui sont syndics à New-York, constitués tels en vertu de la loi de l'Etat de New-York, prétendent avoir droit de retirer l'argent et tous les biens de la défenderesse insolvable, en vertu de la loi de l'Etat de New-York, dont les biens sont liquidés à New-York par ses syndics, les intervenants; lesdits biens et argent de la défenderesse, saisis entre les mains et la possession des tiers-saisis, lesquels ont fait leur déclaration en cette cause. Les intervenants prétendent, de plus, que la distribution des deniers de la défenderesse, saisis en cette cause, doit se faire à New-York, et conformément aux lois de New-York, à cause de l'état d'insolvabilité de la défenderesse comme susdit. Par son jugement dans cette cause, comme dans la cause de Steele sus-mentionnée, la Cour Supérieure a affirmé, et maintient le principe que les deniers, biens et effets de la défenderesse, saisis en cette cause, doivent, par la loi, être distribués par la Cour Supérieure, en suivant les procédés d'usage et d'après les lois de la province de Québec. L'intervention a été déboutée et la saisie déclarée bonne et

valable. Nous sommes d'opinion que le jugement dont est appel est correct. Les deniers sont devant cette cour et doivent être distribués par elle de la même manière que se font les autres distributions. Nous sommes chargés d'administrer les lois de la province, et non celles des Etats-Unis. Le jugement dont est appel doit être confirmé. (1 *R. L.*, p. 190)

PAIEMENT.—BILLET PROMISSOIRE.

COUR DE REVISION, Montréal, 30 avril 1869.

Coram MONDELET, TORRANCE, BEAUDRY, JJ.

ALBERT CHAPMAN *vs* ROBERT MACPHEE *et al.*

Jugé : Qu'un billet dont on demande le paiement dans ce pays doit être payé en argent ayant cours en Canada, quand même le billet serait daté d'un pays étranger.

MONDELET, J. : L'action du demandeur, fondée sur un billet promissoire, a été déboutée par un jugement de la Cour Supérieure de Bedford (Johnson, J.), rendu le 23 octobre 1868. Les défendeurs ont consenti un billet promissoire daté à Rouse's Point, le 15 mars 1862, par lequel ils promirent payer, conjointement et solidairement, à A. Chapman, le demandeur, ou à son ordre, $814, avec intérêt au taux de neuf par cent par an. Le demandeur, n'ayant pas d'argent en mains, a donné à un des défendeurs, pour payer le montant convenu comme considération du billet, un ordre ou chèque sur le shérif du district de Bedford, qui était débiteur de deniers appartenant au demandeur. Le chèque a été accepté par le shérif, et l'argent payé par ce dernier au défendeur, porteur du chèque, en argent courant du Canada. Lorsque le billet est devenu dû, un avocat d'Albany, dans l'Etat de Vermont, un des Etats-Unis d'Amérique, se rendit, de la part des défendeurs, à Nelsonville, où réside le demandeur, et où l'argent avait été donné, et offrit des greenbacks au demandeur, pour payer le montant dû sur le billet. Le demandeur a refusé le paiement en greenbacks, et a exigé de l'argent ayant cours légal en Canada. Il n'y a pas de preuve qui fasse connaître quelle espèce de greenbacks a été offerte ; c'est-à-dire, qu'il n'est donné, par la preuve, aucune description des greenbacks, quant à leur valeur, leur nombre et leur montant. L'avocat qui les a offerts a donné son opinion, comme avocat, que les greenbacks offerts constituaient une offre légale, *a legal tender*, d'après la loi des Etats-Unis, sans spécifier qu'il en était de même d'après la loi de l'Etat de New-York d'où le billet est daté, viz. Rouse's Point

qui est dans l'Etat de New-York. Ce fait, si d'aucune importance dans la cause, aurait dû être prouvé par un avocat de l'Etat de New-York. A part cela, il n'y a pas de preuve que les billets qui avaient été ainsi offerts par l'avocat d'Albany sont les mêmes que ceux déposés entre les mains du protonotaire de la Cour Supérieure, qui a jugé cette action. La question à décider, dans le cas actuel, est de savoir si les défendeurs, qui ont reçu de l'argent ayant cours en Canada, le 18 mars 1862, à Nelsonville, ont droit de payer le billet en greenbacks au demandeur qui, à cause de l'escompte, se trouverait à supporter une perte assez considérable. Nous sommes d'opinion que l'argent reçu par les défendeurs étant de l'argent ayant cours en Canada, ces derniers sont tenus de rembourser de l'argent ayant cours en Canada. Ceci doit avoir lieu dans le cas où le billet promissoire a été fait, daté et signé à Rouse's Point, comme dans le cas où il aurait été daté, fait et signé en Canada, ou fait et signé en Canada, et daté à Rouse's Point. Ce qui doit déterminer la décision d'un pareil cas est la preuve du lieu réel où la transaction a eu lieu et a acquis sa perfection, par la remise de l'argent aux défendeurs, et que ce qui a été avancé aux défendeurs, c'est de l'argent ayant cours en Canada. Or, dans le cas actuel, l'argent reçu par les défendeurs l'a été en Canada et en argent du Canada. L'offre réelle faite par les défendeurs, avant l'action, et déposée en cour est insuffisante et de nulle valeur, pour plusieurs raisons: 1° Il n'appert pas qu'elle ait été faite *à deniers découverts et par énumération*, etc., conformément à notre loi; 2° Elle n'a pas été faite et renouvelée en argent ayant cours en Canada, et pouvant constituer une *offre légale*; 3° Il n'y a pas de preuve que l'argent déposé en cour est le même que celui offert par l'avocat d'Albany au demandeur. La cour de première instance aurait dû débouter *la défense en droit* plaidée par chacun des défendeurs, ainsi que le plaidoyer fait par chacun des défendeurs séparément. Nous sommes d'opinion d'infirmer le jugement dont est appel, de renvoyer les *défenses en droit* et les plaidoyers respectifs des défendeurs, et d'accorder jugement au demandeur conformément aux conclusions de sa déclaration. Le jugement dont est appel paraît reposer sur le fait que le billet promissoire en question étant daté de Rouse's Point, dans l'Etat de New-York, doit être gouverné, quant au recouvrement du montant d'icelui, par la loi de l'Etat de New-York. Cette cour est d'une opinion contraire, et déclare que la loi de ce pays est diamétralement contraire au principe posé par le jugement dont est appel, et que, pour cette raison, nous devons infirmer. (1 *R. L.*, p. 192)

VENTE DE CHOSES A LA MESURE.

COUR DE REVISION, Montréal, 30 avril 1869.

Coram MONDELET, TORRANCE, BEAUDRY, JJ.

JOHN KELLY *et al. vs* MOSES MERVILLE.

Jugé : 1° Que la vente est parfaite par le seul consentement des parties, lorsqu'elle est d'un corps certain et déterminé et pour un prix fixe et déterminé ; que, dans ce cas, l'acheteur a droit de saisir-revendiquer l'objet vendu.

2° Mais que la vente d'objets dont le prix doit être payé à tant la mesure ne peut être parfaite que par la livraison. Que, dans ce cas, l'acheteur n'a pas d'autre action que celle pour demander la livraison des effets vendus, et des dommages, le cas échéant.

3° Que, dans le dernier cas, si l'acheteur institue une action en revendication comme propriétaire, son action sera déboutée sur *demurrer ;* cependant il pourrait avoir droit à une saisie conservatoire des objets vendus.

MONDELET, J. : Le jugement dont est appel a été rendu par la Cour Supérieure pour le district de Saint-François (SHORT, J.) le 23 décembre 1867, renvoyant l'action des demandeurs, sur le *demurrer* du défendeur. Les demandeurs allèguent, dans un premier chef de leur déclaration, qu'ils ont acheté du défendeur tout le houblon croissant sur la ferme de ce dernier, à Clinton, durant la saison de 1867, à raison de 27 cents par livre ; qu'ils ont donné au défendeur vingt piastres en acompte du prix ; que ce dernier refuse de leur livrer le houblon acheté, à la station Lennoxville du Grand Tronc, tel que convenu. Par un second chef, ils allèguent tout ce qui est d'ordinaire dans une action *en revendication.* Mais les conclusions ne découlent pas du premier chef. Elles découlent seulement du second, en autant que les demandeurs demandent à être déclarés propriétaires du houblon. De telles conclusions ne peuvent se maintenir qu'en autant que le demandeur est propriétaire de l'objet réclamé et en a eu la possession. (1) La cour de première instance était-elle justifiable de débouter l'action des demandeurs, sur le *demurrer* du défendeur ? Il est allégué que le savant juge, en rendant le jugement dont est appel, a remarqué que les demandeurs, sur preuve de leurs prétentions, avaient droit de demander et d'obtenir la délivrance du houblon vendu, et que, si ce houblon était en la possession du défendeur, les demandeurs avaient, de plus, le droit de le saisir, par un procédé conservatoire, pour garantir l'exécution de la convention, mais que les de-

(1) Articles 1472, 1474 du C. C. du B. C. Par l'art. 1472, la pleine propriété est transférée du vendeur à l'acheteur par le seul consentement des parties.

mandeurs n'avaient jamais obtenu la propriété absolue du houblon, parce qu'il avait été vendu au poids et qu'il n'avait jamais été pesé ; que, pour cette raison, les demandeurs n'avaient jamais eu le droit de le revendiquer, vu qu'ils n'en avaient jamais acquis la propriété pleine et entière. Nous concourons avec le savant juge, quant à ce qui regarde la distinction à faire entre l'action en revendication et l'action pour obtenir l'exécution d'un contrat. L'une est contre la chose elle-même, par le droit de propriété, qui est passé du vendeur à l'acheteur, et, à défaut de la chose, pour en recouvrer la valeur. L'autre, par son objet, est pour obliger de mettre le sceau à la convention qui est incomplète, et, à défaut de cela, pour réclamer des dommages, mesurés par la perte des profits qu'entraîne l'inexécution de la convention. Les conclusions de la seconde conviendraient pour une action du genre de la présente. Nous adoptons comme strictement corrects les motifs qui ont déterminé la cour de première instance à maintenir le *demurrer* et à renvoyer l'action, et nous sommes d'opinion de confirmer le jugement dont est appel. Le jugement de cette cour repose sur la considération que la vente par le défendeur aux demandeurs du houblon revendiqué en cette cause, est incomplète, et que le houblon vendu n'a jamais été la propriété des demandeurs ; que, conséquemment, les demandeurs ne peuvent légalement en poursuivre la revendication, ainsi qu'ils le font par leur action. (1 *R. L.*, p. 194)

ACTES NOTARIES.—AUTHENTICITE.

COUR DE REVISION, Montréal, 30 avril 1869.

Coram MONDELET, BERTHELOT, TORRANCE, JJ.

WM NOBLE *vs* G.-M. LAHAYE.

Jugé : Que lorsqu'un acte, passé par un notaire, a été rédigé et lu par ce dernier dans une langue étrangère à une des parties contractantes, et que ne comprenait pas cette partie contractante, il y a lieu, pour cette dernière, de faire preuve, par témoins, que l'acte en question ne renferme pas la convention des parties, et que, dans ce cas, il n'est pas nécessaire de recourir à l'inscription de faux pour faire annuler l'acte.

MONDELET, J. : Cette cause a été décidée par la cour supérieure siégeant dans et pour le district de Saint-François. Le jugement a été rendu le 2 mai 1868 (SHORT, J.). L'action a été instituée pour obtenir l'annulation d'une vente de terre, par le défendeur au demandeur, dont acte a été passé entre le demandeur et le défendeur, le 21 février 1867, à Acton, devant

Mignault, notaire. Le demandeur allègue que l'acte est erroné, attendu qu'il ne contient pas la convention des parties, telle qu'intervenue entre elles, et que l'acte de vente devait être basé sur un contrat fait entre Bennett et le défendeur. Il y a, outre cela, allégation de fraude. Le défendeur nie tout cela. La preuve, cependant, est conclusive. Mignault, le notaire, nous dit lui-même que le demandeur ne comprenait pas la langue française, dans laquelle l'acte était rédigé, et qu'après la lecture faite en français, il s'enquit du demandeur s'il était satisfait. Ce dernier lui répondit que non. Alors, le notaire a traduit au demandeur, en anglais, les principales clauses de l'acte. Ce procédé, comme de raison, est évidemment erroné et insuffisant. La comparaison de l'acte en question avec celui de Bennett démontre que ces deux actes sont différents. La preuve entière fait voir que le demandeur a été pris par surprise, que les conventions mutuelles des parties et leur véritable teneur n'ont pas été comprises. Lors de l'audition de la cause, le défendeur a prétendu que le demandeur aurait dû se pourvoir contre l'acte par une *inscription de faux*, et que la preuve testimoniale à l'encontre de l'acte ne pouvait être permise que sur telle inscription de faux. Mais une telle prétention n'est pas correcte. Il n'est pas allégué ni prouvé que le notaire a commis un faux, mais qu'il y a eu malentendu entre les parties, et surtout de la part du demandeur qui n'a pas consenti la convention telle qu'entrée à l'acte. La lecture de la preuve justifie amplement la prétention que la preuve testimoniale doit être permise. L'enquête des parties est toute favorable au demandeur. Le jugement dont est appel, qui casse et annule l'acte, sur le principe qu'il y a erreur et défaut de consentement, et qui remet les parties, à tous égard, dans la même position qu'avant la passation de cet acte est correct et doit être confirmé. (1 *R. L.*, p. 197)

COMPTE DE MEDECIN.—PRESCRIPTION.

COUR DE REVISION, Montréal, 31 mai 1869.

Coram MONDELET, BERTHELOT, TORRANCE, JJ.

MICHEL VALOIS *vs* MICHEL ROY.

Jugé : 1° Que les comptes des médecins, antérieurs au Code, se prescrivent par cinq ans.

2° Que le médecin, demandeur dans une cause, ne peut faire preuve de son compte, par son propre serment, sans au préalable en avoir obtenu la permission de la cour.

Le juge MONDELET : Il est question en cette cause de savoir si le défendeur est en droit de plaider, et de faire prononcer

que le compte du demandeur, qui est médecin, est prescrit, en partie, pour cinq années à commencer en 1857. Il ne peut pas exister de doute que le compte du demandeur est prescrit, pour tout ce qui est en dehors des cinq ans à venir jusqu'à la signification de l'action. Le défendeur offre $11.50, pour lesquelles, par son exception péremptoire, il offre de confesser jugement. Il doit y avoir jugement pour ce montant, avec les dépens jusqu'à la production du plaidoyer, et, quant au surplus, l'action du demandeur doit être déboutée, avec les dépens de la contestation. Le demandeur a donné sa déposition sous serment, pour prouver son compte, et a produit cette déposition au dossier. Un tel procédé est tout à fait irrégulier. Le médecin ne peut donner son serment pour prouver son compte, sans au préalable, en avoir obtenu permission de la cour, sur motion à cet effet. Dans les circonstances de la cause, du reste, le demandeur n'avait aucun droit à l'exercice du privilège d'en être cru à son serment, quant aux visites, médicaments et vacations qu'un médecin peut avoir droit de réclamer dans certains cas. Le jugement est donc pour $11.50, avec dépens tel que ci-dessus dit. (1 *R. L.*, p. 199)

APPEL A LA COUR DU BANC DE LA REINE.

COUR D'APPEL, le 14 juillet 1866.

Coram LAFONTAINE, AYLWIN, DUVAL, CARON, JJ.

ANDREWS *et uxor*, appelants, *et* DAVIES, intimé.

Jugé: Qu'il n'y a pas d'appel à la Cour du Banc de la Reine de jugements rendus, soit par un juge en chambre, soit par le juge siégeant *in banco*, sur des matières sommaires de juridiction non contentieuse.

Voici l'arrêt rendu en cette cause: "La cour, considérant " que les procédés en cette cause ont rapport au *scellé*, ou à " l'apposition et à la levée des scellés, et que de tels procédés " sont de ceux requérant célérité et prompte expédition et, " sous le système de judicature en force dans le Bas-Canada, " il n'y a pas de provisions légales permettant l'appel à cette " cour d'ordres ou jugements donnés et rendus dans ces " matières, soit par la Cour Supérieure, ou par un juge d'icelle, " ou par un juge de la Cour de Circuit; renvoie l'appel en cette " cause, avec dépens. [L'Hon. L.H. LAFONTAINE, baronnet, *dis-* " *sentiente.*]"

Le juge LAFONTAINE, ayant motivé son dissentiment, nous reproduisons ses notes manuscrites qui traitent de questions importantes pouvant se présenter, même sous le Code de Pro-

cédure Civile, dont les rédacteurs ont adopté en grande partie, comme droit nouveau, les opinions exprimées dans ces notes. Dans la troisième partie du Code de Procédure Civile qui traite des matières de juridiction non contentieuses, l'article 1340, qui est inséré au code comme étant *de droit nouveau*, accorde la revision devant trois juges de la Cour Supérieure de toute décision rendue sur ces matières non contentieuses par le tribunal ou le juge siégeant in *banco*, ou par le juge en chambre. Mais y a-t-il appel à la Cour du Banc de la Reine de cet appel devant trois juges, qui paraît être un appel spécial? C'est là une question que la savante dissertation du juge LAFONTAINE peut aider à résoudre.

SIR LAFONTAINE, baronet: "Il s'agit d'une question d'apposition et levée de scellés et de l'opposition qui a eu lieu en pareille matière. Les deux questions suivantes ont été soulevées: "1° Un seul juge de la Cour Supérieure (cour de première instance) étant compétent à prendre connaissance de cette matière, l'ordonnance de ce juge peut-elle être soumise à l'examen et à la revision du tribunal siégeant *in banco*; 2° Si cette question est décidée dans l'affirmative, y a-t-il appel de la sentence de ce tribunal à cette cour? Dans le titre 17 de l'Ordonnance du Code Civil de 1667 (Serpillon), qui est consacré aux matières sommaires, nous lisons, art. 4: "Reputons encore pour matières sommaires les appositions et levées de scellés, les inventaires et clôtures *en ce qui concerne la procédure seulement, etc.*" En pareille matière il y avait appel; l'Ord. le reconnaît expressément en disant, art. 11: "Tout ce "dessus sera exécuté en 1re instance et en cause d'appel à peine "de nullité," et puis art. 13: "Les jugements définitifs donnés "ès matières sommaires seront exécutoires par provision en "donnant caution, nonobstant oppositions ou appellations, et "sans préjudice." V. encore les autres arts du même titre de l'Ord. Pothier, dans son traité de Procédure Civile, en parlant des sentences qui s'exécutent nonobstant l'appel par la nature de l'affaire, dit, p. 159, vol. 10: "Toutes les autres matières sommaires qui requièrent célérité, et auxquelles, par conséquent, il échet de juger par provision, s'exécutent nonobstant l'appel, pourvu que l'objet n'excède pas mille livres (Ord. de 1667, tit. 17, art. 14; lequel art. avait été modifié par la rédaction de cette Ordonnance pour le Canada en ce que la somme avait été réduite à 250 livres). Pothier ajoute: "Le règlement du Parlement de 1658 énonce plusieurs de ces matières sommaires qui requièrent célérité et pour lesquelles les jugements s'exécutent par provision, savoir les jugements et ordonnances touchant la confection d'inventaires, appositions et levées des scellés. Quoique le règlement de 1658 dit indéfiniment que les sentences rendues sur ces matières s'exécutent *nonobstant l'appel*, il pa-

rait que le règlement doit s'entendre des cas où l'objet n'excède pas 1000 livres." (Argument de l'art. 3 du titre 17). Dans les matières sommaires qui ne requièrent point célérité, et dans lesquelles il n'échet pas de juger par provision, les sentences définitives s'exécutent *nonobstant l'appel*, lorsque la condamnation n'excèdent pas..." etc. Guyot, *Rep. de Jurisprudence*, t. 1, au mot "*Appel*," p. 492 : "On peut la prendre (la voie d'appel) contre toutes sortes de jugements interlocutoires ou de pure instruction, *même contre une simple ordonnance sur requête*." Pigeau, t. 1, p. 499 : "Comme on peut avoir à se plaindre de toutes sortes de jugements, on peut appeler de tous : ainsi on le peut...d'une ordonnance du juge rendue sur requête, comme de celle qui l'est après avoir entendu les parties." Ravaut, *Procédure Civile*, p. 743 : "On peut se pourvoir par appel contre une apposition de scellés." Je citerai encore Rodier dans un commentaire sur l'Ord. de 1667, p. 233, où en parlant de l'art. 4 du titre 17 de cette Ordonnance, l'auteur dit : " Les seules procédures concernant l'apposition ou levée des " scellés, et la confection des inventaires, ou les oppositions à " ces procédures, sont *matières sommaires*, c'est-à-dire les " questions, savoir s'il y a lieu d'apposer ou lever le scellé, de " faire l'inventaire ou non, et en quelle forme l'un et l'autre " doit être, de quelque valeur que soient les meubles et " effets à comprendre dans l'inventaire ; car *les autres contes-* " *tations* sur les inventaires, sur les préférences, sur les droits " et qualités des parties ne sont pas *matières sommaires*." [L'auteur renvoie au procès-verbal des conférences sur cet article]. Je n'ai cité ces autorités que pour démontrer d'abord ce qu'il peut y avoir de sommaire en matière de scellé et ensuite que l'appel existait dans l'ancien Droit Français, qui est le nôtre. Il est encore à remarquer qu'en France un seul juge pouvait agir en matière de scellé ; sauf le renvoi à l'audience et par conséquent l'examen et la revision par le tribunal de l'ordonnance de ce juge, lorsque ce renvoi devait avoir lieu par la nature de l'affaire. Nous lisons dans Pigeau, t. 2, p. 288 : " Toutes les fois que les raisons d'opposer à l'apposition ne " sont pas de la dernière évidence, le juge à qui l'on en réfère, " renvoie au principal les parties à l'audience, et cependant " ordonne que par provision et sans préjudice aux droits des " parties au principal, le scellé sera apposé à la conservation " des droits de qui il appartiendra, et sauf à dire en définitif " aux frais de qui." Voir aussi le *Rep. de Jurisprudence*, t. 16, au mot "*scellé*," p. 143. Il s'agit ici d'un *référé* qu'ordonne *le commissaire* nommé par le juge pour apposer le scellé. La nomination d'un tel commissaire est autorisée, même par nos lois statutaires. Ainsi, en France, l'exercice de la juridiction, par un seul juge, en matière de scellé, n'enlevait

pas au tribunal entier cette même juridiction. Puisque les actes de ce juge, ainsi que ceux du commissaire qu'il délègue, pouvaient être référés à l'audience, il s'ensuit que ce tribunal avait droit d'examen et de revision. Quant aux décisions des tribunaux touchant l'appel en matière de scellé, on en trouve un grand nombre recueillies dans la collection de Denizart au mot "*Scellé.*" Il suffit pour la présente espèce d'en citer une seule. C'est l'arrêt rapporté au n° 18, p. 463, concernant la succession du nommé Blavier. Il y avait eu apposition de scellé, à la requête de son neveu, suivie d'une opposition de la part de sa veuve; "sur cela intervint une ordonnance de M. le "Lieutenant-Civil au Châtelet de Paris, qui, au principal, "renvoya les parties à l'audience, et cependant, par provision, "ordonna que les scellés seraient apposés. Appel de la part "de la veuve. L'intimé soutenait que l'on ne pouvait interje-"ter appel d'une ordonnance qui ne jugeait rien au fond puis-"qu'elle renvoyait les parties à l'audience. La veuve répondait "qu'une ordonnance était un jugement, susceptible, par consé-"quent, d'être réformé par la voie de l'appel. C'est aussi ce "qui fut jugé par arrêt du vendredi 29 mai 1767. La "cour mit l'appellation au néant, émendant, condamna l'in-"timé à payer 481 livres 12 sols pour les frais de scellés "apposés *sans droit apparent*, et en tous les dépens." S'il y avait appel en France en matière de scellé, l'on serait forcé d'admettre qu'il y avait appel en Canada, après l'enregistrement au Conseil Supérieur de Québec, de l'Édit du mois de juin 1679, intitulé : "Edit du Roi pour l'exécution de l'Ordonnance de 1667, ou *Réduction du Code.*" Aucune loi provinciale n'a décreté l'abolition de cet appel d'une manière expresse ; et je ne pense pas qu'on puisse logiquement ou légalement présumer ou arguer cette abolition du fait seul que nos lois qui réglementent n'ont pas *nommément* compris le scellé au nombre des matières qu'elles reconnaissent être susceptibles d'appel. Ces lois, à venir jusqu'aux derniers actes de judicature de 1849, statuent pour des cas déterminés ; telle est, par exemple, la restriction apportée par l'ordonnance de 1785, à l'exercice de la voie d'appel des jugements interlocutoires, qui, depuis cette époque, ne peuvent être réformés par cette voie, avant le jugement final de l'instance, que dans les trois ans indiqués dans cette circonstance ; telle est encore la disposition de l'acte de judicature de 1794, qui exige, pour l'appel, que la matière en litige excède la somme de vingt livres sterling. Cette règle qui, du reste, est soumise par le statut même à plusieurs exceptions, ne peut avoir rapport qu'à des matières pécuniaires ou appréciables à prix d'argent et dans lesquelles cette considération domine et doit être directement ou subsidiairement la fin. Mais ces dispositions limitatives du droit

d'appel dans les cas ainsi déterminés, ne doivent pas être interprétées comme abolitives de l'exercice de ce même droit dans d'autres cas, sur lesquels elles ne portent pas ; tel est le cas du scellé ; tel est celui de l'élection d'un tuteur ; tel peut encore être, dans quelques occasions, celui d'une contrainte par corps, ainsi que cela a été décidé par cette cour, l'année dernière, dans la cause de *Mercure* et *Laframboise*, 5 D. T. B. C., p. 168 ; 4 R. J. R. Q., p. 322, et 12 R. J. R. Q., p. 171. En matière de tutelle, aucune des lois provinciales dont il s'agit ne donne nommément le droit d'appel. Cependant l'on est admis à l'exercer comme on l'a fait dernièrement dans la cause de *Beaudet* et *Dunn*, P. D. T. M., p. 14 ; 5 D. T. B. C., p. 344 ; 2 R. J. R. Q., p. 328, et 15 R. J. R. Q., p. 40. Il me semble que, s'il y a lieu de l'exercer dans le cas de la tutelle, il doit aussi y avoir lieu de l'exercer dans le cas du scellé. Si, pour le premier cas, l'on invoque les exceptions des " droits à venir " consacrées par le statut,on peut aussi les invoquer dans le second. La Législature, en promulguant l'acte de 1794, a pris le soin de déclarer, dans la huitième section, que les Cours du Banc du Roi, créées par cet acte, chacune composée de quatre juges, seraient compétentes (siégeant en " terme supérieur " où il fallait laprésence d'au moins deux de ces juges pour former le quorum), à entendre et juger toutes plaintes, procès et demandes de nature quelconque " dont prenaient connaissance les Cours de Prévôté, Justice Royale, Intendant ou Conseil Supérieur " avant 1759, touchant tous droits, remèdes et actions d'une nature civile et qui ne sont pas spécialement *pourvus* par les lois et ordonnances de cette province, depuis ladite année 1759." Puis il est déclaré, sous la forme d'un provisoire, que la disposition qui précède ne s'étendra pas " à rendre nécessaire la présence et autorité de plus d'un seul des juges desdites Cours du Banc du Roi, dans toutes les matières *qui requièrent célérité*, comme.... élection de tutelle.... appositions et levées de scellés et autres matières de même nature, *qui pourraient être transigées, soit en cour, hors d'icelle, ou hors du terme.*" Il y a dans l'anglais : *which may be done either in or out of court, or out of term.* Ainsi l'on voit que la juridiction, en matière de scellé, est déclarée ou reconnue appartenir à ces Cours du Banc du Roi. Elle peut être exercée, il est vrai, par un seul juge, comme cela se pratiquait sous l'ordonnance de 1667. Mais cela ne peut avoir l'effet d'enlever au tribunal entier sa juridiction. La lui nier, parce qu'un seul de ses membres peut agir en pareille matière, me semble être une erreur qui devrait se dissiper à la lecture de la dernière partie de la 9ème section du même acte de judicature de 1794, où il est dit : " Il sera loisible aux ou à aucun des juges (dans l'anglais : " *lawful for all or either of the judges*) desdites Cours du Banc du Roi, res-

pectivement, d'appointer un notaire ou autre personne convenable, sur l'application des parties pour l'apposition et levée des scellés sur requête présentée à cet effet." Le pouvoir d'examiner et de reviser l'ordonnance du juge en matière de scellé a été exercé par la Cour du Banc du Roi de l'acte de 1794, du moins par celle du district de Montréal. Il suffit de citer la célèbre cause de *Pothier* contre *Les héritiers Foretier*. Pothier, comme exécuteur testamentaire de Foretier, avait fait apposer les scellés en vertu d'une ordonnance du juge OGDEN. Les héritiers formèrent opposition, et voici le jugement qui fut rendu sur cette contestation le 18 avril 1816 : " La cour, après avoir " considéré et examiné l'ordonnance de l'Honorable Isaac " OGDEN, l'un des juges de cette cour, en date du 15ème jour " du présent mois d'avril, au bas de la requête et demande du " Sieur Pothier, de Montréal, exécuteur du testament et ordon- " nance des dernières volontés de Pierre Foretier, en son vivant " dudit Montréal, laquelle ordonnance permet à Mtre Louis " Guy, notaire public, d'apposer le scellé sur les meubles, effets, " titres et papiers laissés par ledit Pierre Foretier, et après avoir " vu l'opposition à l'exécution de ladite ordonnance par l'Hono- " rable Louis-Charles Faucher, etc. (héritiers Foretier): Vu " aussi leur requête à fin de révocation de ladite ordonnance " du scellé, comme ayant été obtenue sans raison suffisante et " d'une manière irrégulière, avec l'ordonnance dudit Honorable " Isaac Ogden, qui ordonne que lesdits procédés soient mis " devant cette cour pour entendre les parties intéressées, et " ayant entendu lesdites parties par leurs avocats : La cour a " rescindé et rescinde ladite ordonnance de scellé et décharge " la garnison ou les personnes appointées par ledit Mtre Louis " Guy, notaire public, à la garde et possession desdits meubles, " effets, titres et papiers dudit Pierre Foretier." Ayant eu communication des notes manuscrites de M. le juge REID dans cette affaire, j'en transcris la partie qui peut s'appliquer à la présente espèce: " Under the statute (1794, ch. 6) matters " requiring despatch including *Scellé* may be done in or out " of court or out of term. These things were considered by the " ord. of 1667, tit. 17, art. 4, as *matières sommaires*, upon " which it is held that the judge, out of court, although he " may determine *provisoirement* in regard of difficulties aris- " ing thereon, yet he may and ought to transmit the proceed- " inds into the court for the decision on the merits. This the " judge has done here and looking at the order for the *scellé*, " the opposition made thereto, the return of the commissioner " in consequence and the order of the judge transmitting the " whole before this court, they consider themselves legally seized " of the case and competent to determine thereon." Rep., v° *Scellé*, p. 143; Denisart, v° *Scellé*, n° 31; 2 Pigeau, p. 284.

Dans une cause de *Proulx dit Clément* contre *Godin* (1839-1840), une motion fut faite de la part du défendeur à la même cour du Banc du Roi, pour obtenir la levée du scellé et la revision de l'ordonnance du juge qui en avait permis l'apposition. La motion fut rejetée il est vrai, mais seulement à raison de l'insuffisance des moyens invoqués à l'appui, et non pas à raison du défaut d'autorité du tribunal d'examiner et de reviser l'ordonnance que le juge avait rendue hors du terme. (Jugt, 17 avril 1839). Telle était la jurisprudence bien établie sur cette matière dans le district de Montréal, lorsque le nouvel acte de judicature de 1849, chap. 38, fut promulgué ; et je ne sache pas qu'il ait existé une jurisprudence contraire dans aucun des autres districts. Par la 74ième section de cet acte qui venait de substituer la "cour supérieure" aux ci-devant Cours du Banc du Roi pour les matières civiles, il est statué que " la Cour de Circuit et tout juge tenant cette cour... tant en cour que hors de cour, pendant les termes et hors des termes, ou durant la vacance, aura et pourra exercer dans les limites desdits circuits respectivement, *et concurremment avec les juges de la Cour Supérieure* les mêmes pouvoirs et autorités dont sont revêtus la *Cour Supérieure*, et les juges d'icelle pour élection et nomination de tuteurs.... apposition et levée des scellés." N'est-ce pas reconnaître clairement que la *Cour Supérieure comme telle* possède et que lesdites ci devant cours du Bas-Canada avaient possédé jusqu'alors la juridiction en matière de scellé, bien que l'un des membres de ces cours pût seul agir en cette matière, dans les cas qui ont été exposés ? N'est-ce pas également reconnaître que l'attribution faite à un seul juge n'est pas enlever au tribunal entier sa juridiction ? Or dans l'exercice de cette juridiction, le tribunal *comme tel* devait nécessairement avoir le droit d'examiner et de reviser les ordonnances de ce juge. S'il ne l'eût pas eu, quelle juridiction eût-il donc pu exercer ? Aucune, puisque dans ce cas (et il est impossible d'en venir à une autre conclusion) la matière de scellé se fut trouvée être attribuée exclusivement à un seul juge. Cependant voici une reconnaissance, par acte législatif, de l'attribution de cette juridiction, non pas seulement à chacun des juges individuellement, mais encore à la cour supérieure comme corps. Le législateur ne s'est pas contenté de dire : "pouvoirs et autorités dont sont revêtus les juges ;" mais dans la crainte peut-être que cette manière de s'exprimer ne donnât lieu à quelque doute, il a eu soin d'ajouter : " pouvoirs et autorités dont sont revêtus la Cour Supérieure et les juges d'icelle," c'est-à-dire le tribunal lui-même. Ce n'est pas tout ; nous lisons encore dans la 74ème section de l'acte de 1849 le *proviso* suivant : " Pourvu toujours que les nominations et ordres donnés et faits par tout juge en vertu de cette section,

pourront être mis de côté par la Cour Supérieure siégeant dans le district, de la même manière et suivant les mêmes dispositions de la loi en vertu desquelles toutes nominations, ou ordres donnés ou faits par un seul juge auraient pu être mis de côté, immédiatement avant l'époque de la mise en vigueur du présent acte." A mon avis, cette dernière disposition du statut reconnaît clairement le pouvoir de la Cour Supérieure d'examiner et de reviser l'ordonnance du juge en matière de scellé, pouvoir que cette cour a exercé, depuis la promulgation de cette loi, dans la cause de *Cardinal* et *Belinge* (1). Dans la cause de *Pothier* et *Foretier*, il y eut appel de la part du premier sur motion de l'autre partie ; le bref d'appel fut rejeté mais rien n'indique que ce fut à raison du défaut de compétence dans l'ancien tribunal d'appel. Au contraire, en décla-

(1) Le chap. 7 des Statuts du Bas-Canada de 1801, 41 Geo. 3, intitulé : " Acte pour amender certaines formes de procéder dans les cours de juridiction civile en cette province, et pour faciliter l'administration de la justice," décrétait, sec. 18 : "Que dans tous les cas d'élection et nomination d'un tuteur ou tutrice, curateur ou curatrice, soit à la personne ou aux biens, ou *ad hoc*, homologuée devant un ou plusieurs des juges des cours civiles de cette province, hors des cours, il sera loisible auxdites cours, dans les termes supérieurs seulement, sur requête des plus proches parents, afin de mettre à côté et annuler telles susdites élection et nomination, et après connaissance de cause, ledit tuteur ou tutrice, curateur ou curatrice ayant été entendu, de mettre à côté et annuler tels appointement et nomination pour les causes prononcées par la loi, et d'ordonner qu'il sera procédé à une nouvelle élection, en la manière et forme ordinaire. Le ch. 38 des Statuts du Canada de 1849, 12 Vict., intitulé : " Acte pour amender les lois relatives aux cours de juridiction civile en première instance, dans le Bas-Canada," décrétait, sec. 74 : " Que la Cour de Circuit et tout juge tenant cette cour à un endroit quelconque, tant en cour que hors de cour, pendant les termes et hors des termes, ou durant la vacance, aura et pourra exercer dans les limites desdits circuits respectivement et concurremment avec les juges de la Cour Supérieure, les mêmes pouvoirs et autorités dont sont revêtus la Cour Supérieure et les juges d'icelle pour vérification de testaments, élection et nomination de tuteurs, curateurs, avis de parents et amis dans les cas où la loi le requiert, clôtures d'inventaires, attestations de comptes, insinuations, apposition et levée des scellés, et l'expédition de tous autres actes de la même nature qui ne souffrent pas de délai, et les procédures en pareil cas formeront partie des records de la Cour de Circuit dans le circuit dans lequel les procédures auront lieu : pourvu toujours, que les nominations et ordres donnés et faits par tout juge en vertu de cette section, pourront être mis de côté par la Cour Supérieure siégeant dans le district, de la même manière et suivant les mêmes dispositions de la loi en vertu desquelles toutes nominations ou ordres donnés ou faits par un seul juge auraient pu être mis de côté immédiatement avant l'époque de la mise en vigueur du présent acte." Il a été jugé, sous ces dispositions, que la Cour Supérieure a le pouvoir formel de reviser un jugement de la Cour de Circuit ordonnant l'apposition des scellés sur les biens meubles et effets d'une succession. Lorsqu'une testatrice dispose de tous ses biens, en pleine propriété, en faveur de son mari, exemptant ce dernier de l'obligation de faire inventaire, à condition qu'il ne se remarie pas, cas auquel il serait tenu de rendre compte aux héritiers de la testatrice, l'ordre d'un juge de la Cour de Circuit de faire un inventaire avant la levée des scellés apposés sur les meubles et effets d'une succession, à la demande de quelques héritiers, est un jugement rendu dans l'intérêt de toutes les parties et qui ne doit pas être altéré. (*Ex parte Cardinal*, requérant levée des scellés, et *Belinge*, tuteur, C. S., Montréal, 10 mai 1853, DAY, J., Smith, J., et VANFELSON, J., 3 D. T. B. C., p. 435)

rant *absolue*, purement et simplement, la règle prise par l'intimé pour faire débouter l'appel, le tribunal est censé avoir reconnu qu'il avait juridiction dans cette matière. Autrement il se serait abstenu de prononcer, en proclamant son incompétence. La principale raison qu'on donne pour nier le fait, ou plutôt l'exercice du droit d'appel en matière de scellé, est fondée sur les longs délais que doit nécessairement entraîner la procédure en appel, cette cour ne siégeant que quatre fois l'année. J'avoue que cela est un inconvénient, mais ce n'est pas une raison suffisante pour que nous refusions à une partie l'exercice d'un droit que la loi lui donne. Si cet inconvénient rend désirable l'abolition du droit d'appel, c'est au Parlement à intervenir et non pas aux juges à s'ériger législateurs par une simple décision entre deux parties. Du reste l'inconvénient dont on parle peut disparaître d'un moment à l'autre. Que dès demain une nouvelle loi nous permette de siéger en appel tous les mois ou toutes les semaines, alors le motif que l'on fait valoir aujourd'hui pour refuser l'exercice de la voie d'appel, tombe de lui-même, il n'existera plus. Force sera donc d'admettre l'appel dans ce dernier cas. Ce n'est, ce me semble, ni plus ni moins que de faire dépendrearbitrairement l'exercice d'un droit du nombre de jours, plus ou moins grand, qui devra s'écouler, selon les circonstances, avant que ce tribunal soit saisi de l'instance et puisse prononcer : " C'est une proposition que je ne puis pas adopter dans l'espèce, mais comme je suis le seul juge qui pense ainsi, l'appel va être débouté par le jugement de la majorité.' (1 *R. L.*, p. 210)

CAUTIONNEMENT EN APPEL.

COUR DU BANC DE LA REINE, EN APPEL,

Québec, 20 juin 1868.

Présents : DUVAL, J. en C., CARON, J., dissident, DRUMMOND, J., et BADGLEY, J.

LA FABRIQUE DE SAINTE-JULIE-DE-SOMERSET, appelante, *et* OLIVIER PAQUET, intimé.

Jugé: 1. Que le cautionnement en appel, dans les appels de la Cour de Circuit, doit, à peine de nullité, mentionner une somme déterminée pour laquelle les cautions se rendent responsables.

2. Qu'on doit y annexer les affidavits par lesquels les cautions ont justifié de leur solvabilité ; sinon, le cautionnement sera rejeté, même si l'intimé n'a pas invoqué cette cause de nullité. (1 *R. C*, p 233)

CAUTIONNEMENT EN APPEL.

COUR DU BANC DE LA REINE, EN APPEL,
Québec, 14 décembre 1868.

Présents: DUVAL, J. en C., CARON, J., BADGLEY, J., MONK, J., et MACKAY, J.

LA FABRIQUE DE SAINTE-JULIE-DE-SOMERSET, appelante, et OLIVIER PAQUET, intimé.

Jugé: Qu'il n'est pas nécessaire que le cautionnement, dans les appels de la Cour de Circuit, mentionne une somme déterminée pour laquelle les cautions se sont rendues responsables. (1 *R. C.*, p. 233)

CAUTIONNEMENT EN APPEL.

COUR DU BANC DE LA REINE, EN APPEL,
Québec, 20 septembre 1868.

Présents: DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J.

GINGRAS *et* VEER.

Jugé: Que les affidavits de justification des cautions en appel n'ont pas besoin d'être annexés au cautionnement. (1 *R. C.*, p. 233)

JUGEMENTS.—EXPERTISE.—CONTRAT.

COUR D'APPEL, Québec, 20 juin 1869.

Présents: DUVAL, CARON, MONK et MACKAY, Juges.

LA FABRIQUE DE SAINTE-JULIE-DE-SOMERSET, appelante, *et* OLIVIER PAQUET, intimé.

Jugé: 1° Que l'article 472 du Code de Procédure n'est pas obligatoire pour les juges, et qu'un jugement n'est pas nul, par cela seul qu'il manque de toutes les conditions de forme exigées par la loi;

2° Qu'une cour peut adopter un rapport d'experts dont personne n'a demandé l'homologation;

3° Qu'un rapport d'experts n'est pas nul, à raison de ce que les experts n'ont pas donné aux parties avis du jour où ils procèderaient, ne se sont pas conformés à l'ordonnance qui les a nommés, et se sont entendus eux-mêmes comme témoins;

Paquet et la fabrique font un marché devant notaire, par lequel Paquet s'engage à faire certains ouvrages à l'église de la paroisse. Des difficultés s'étant élevées entre eux, la fabrique refuse de payer à Paquet, qui n'avait exécuté qu'une partie des ouvrages, la somme de $140.20 réclamée par lui. L'intimé poursuit l'appelante pour cette somme, ne fait, dans sa déclaration, aucune mention du marché devant notaire, et demande les $140.20, comme valeur des ouvrages qu'il a faits et des matériaux qu'il a fournis. L'appelante se défend, 1° par une exception perpétuelle où elle demande le renvoi de l'action de Paquet, parce qu'il ne l'a pas basée sur le marché devant notaire ; 2° par une exception perpétuelle où elle prétend avoir payé plus que la valeur des travaux faits par l'intimé, d'après le prix fixé par le marché. Deux experts et un tiers expert sont nommés, et la cour leur réfère *les matières en question dans la cause*, dit le jugement qui les nomme. Ces experts agissent comme si ceux nommés par les parties étaient sous la direction du tiers expert nommé par la cour. C'est ce dernier qui donne seul les avis ; il n'en fait parvenir aucun à l'appelante et se contente d'en déposer pour elle une copie au greffe. Les experts entendent deux d'entre eux comme témoins, et ne peuvent réussir à s'entendre pour faire un rapport commun. Chacun fait, en conséquence, un rapport distinct de celui de ses collègues. L'intimé demande l'adoption du rapport de son propre expert, et l'appelante propose le rejet des trois rapports ensemble, comme entachés d'irrégularités, et en se fondant sur ce que les experts n'ont pas obéi au jugement de la cour, qui leur ordonnait d'examiner toutes les prétentions des parties, et, entre autres, les questions de savoir si les ouvrages, dont le prix était réclamé par l'action, étaient les mêmes que ceux pour lesquels il y avait un marché devant notaire. La cour, présidée par l'hon. juge STUART, rendit le jugement que voici : " Considering that, by the report of " one of the experts, and the third expert, a sum of $77.20 " at least, is declared to be still due by the defendant to the " plaintiff, the court doth adjudge and condemn the defen- " dant to pay to the plaintiff, for the causes mentioned in " plaintiff's declaration the said sum of $77.20, with interest and costs." C'est ce jugement qui a été déféré à la cour d'appel, comme irrégulier dans la forme et erroné au fond. L'appelante a prétendu qu'il ne satisfaisait à aucune des conditions exigées par l'article 472 du code de procédure. Elle a soutenu, en outre, qu'il renfermait un mal-jugé, en ce qu'il homologuait un rapport d'expert irrégulier dans la forme, et dont personne n'aurait demandé l'adoption, en ce qu'il maintenait une action pour un *quantum meruit*, alors que, de l'aveu du tiers expert lui-même, une convention spéciale devant notaire était prouvée.

Malgré ces raisons, la cour d'appel a confirmé purement et simplement le jugement de la cour de circuit, et déclaré, par l'honorable juge DUVAL, que ce jugement *avait rendu parfaite justice aux parties.* (1 *R. L.*, p. 430)

SALAIRE DU GARDIEN D'OFFICE.

COUR DE CIRCUIT, Sorel, 16 juin 1865.

Coram LORANGER, J.

EDOUARD COURCHÊNE *vs* J.-A.-E. GÉNÉREUX.

Jugé: Que l'huissier, chargé d'un bref de saisie, est personnellement responsable du salaire du gardien d'office qu'il a nommé.

Le demandeur alléguait, dans sa déclaration, que le 10 juin 1864, il aurait été spécialement nommé gardien d'office par le défendeur, huissier de la Cour Supérieure du Bas-Canada, d'une cage de bois carré ou radeau, saisie par le défendeur, ès-qualité, à la poursuite de diverses personnes; qu'en vertu de la susdite nomination, le demandeur s'était engagé envers le défendeur à garder ladite cage tant qu'elle demeurerait sous saisie; que le demandeur avait ainsi gardé ladite cage durant le temps et espace de treize jours et treize nuits, à l'expiration desquels il a été déchargé de ladite garde par le défendeur; que, pour chaque jour, y compris la nuit, de ladite garde, le demandeur avait été taxé par ladite Cour de Circuit à la somme de $2, formant, en tout, $26; que le défendeur était responsable en loi au demandeur, pour ladite somme de $26, et qu'il était en droit de lui demander ladite somme; qu'il avait mérité et méritait de l'avoir, ayant été engagé par le défendeur et ayant rempli ses obligations envers lui, à son profit et avantage. Le défendeur répondit par une *défense en droit* et par une *exception péremptoire en droit,* alléguant que, lors de la nomination du demandeur comme gardien, dans les causes ou poursuites mentionnées en la déclaration, le défendeur agissait en sa qualité d'huissier chargé d'exécuter et signifier les ordres et saisies émanés de ladite cour, dans lesdites causes, au nom des divers demandeurs en icelles, dont le défendeur était alors porteur, pour et au nom desdits demandeurs. Le demandeur prouva les faits contenus en sa déclaration, et produisit un certificat du greffier de la Cour de Circuit conçu en ces termes: " Sorel, 23 juin 1864. Je considère que

" dix chelins par jour pour chaque gardien seraient raison-
" nables, ce qui ferait $26 à chacun. [Signé] A. N. GOUIN, G. C. C."

Jugement, tel qu'entré dans les registres de la Cour :

" La cour, déboutant le demandeur du surplus de sa demande, condamne le défendeur à payer au demandeur la somme de $13 due à ce dernier par le défendeur, pour les causes et considérations mentionnées en sa déclaration, avec intérêt sur icelle somme à compter du 31 août 1864, jour de l'assignation, jusqu'au paiement." (1 *R. L.*, p. 433)

PICHÉ et BRASSARD, avocats du demandeur.

J. ARMSTRONG, avocat du défendeur.

CERTIORARI.

COUR SUPÉRIEURE, EN REVISION,

Montréal, 30 novembre 1865.

Coram BADGLEY, J., BERTHELOT, J., MONK, J. A.

Ex parte HERCULE BEAUPARLANT, *et* F. GERVAIS et L. J. GRENIER, juges de paix.

Jugé : 1° Qu'une motion pour bref de *certiorari* peut être rejetée avec dépens lorsque les juges de paix siégeant sous le chapitre six des Statuts Refondus du Bas-Canada ont seuls comparu par un avocat.

2° Qu'un bref de *certiorari* ne sera pas accordé : 1° parce que l'inspecteur du revenu poursuivant pour contravention au ch. 6 des Statuts Refondus du Bas-Canada (vente sans licence) n'a pas allégué que le défendeur n'était pas distillateur, ni marchand de vins ; 2° parce qu'il n'a pas fait d'autres allégués négatifs (*negative averments*) que celui que le défendeur n'avait pas la licence exigée par la loi; 3° parce que la conviction n'indique pas précisément le jour où l'offense a été commise; 4° parce que les juges de paix ont ordonné qu'à défaut de *meubles suffisants le défendeur serait emprisonné*; 5° parce que les juges de paix ont condamné à un emprisonnement de deux mois qui devait *compter du jour de l'incarcération.*

Aimé Roy, percepteur du revenu de l'intérieur pour le district de Richelieu, poursuivit le requérant, le 20 mars 1865. La déclaration était rédigée en termes : "Attendu que le défendeur, ayant, au lieu de Saint-Aimé, dans ledit district, dans la maison et les lieux par lui occupés, le ou vers le quinzième jour du mois de janvier 1865, et en différents temps avant et depuis, vendu et souffert qu'il fut vendu en détail, en quantité moindre que trois gallons à la fois, certaines liqueurs ou boissons enivrantes, savoir du brandy et du whiskey, sans la licence prescrite en

pareil cas, contrairement aux dispositions des statuts faits et passés à cet égard, et, notamment, à celles du chapitre six des Statuts Refondus du Bas-Canada, à raison de quoi et en vertu desquels statuts, le défendeur est devenu passible de payer la somme de cinquante piastres. A ces causes, le percepteur du revenu de l'intérieur, pour le district de Richelieu, demande jugement, et que le défendeur soit condamné à payer la somme de cinquante piastres à raison de ladite contravention, avec dépens." Le 23 mars 1865, deux juges de paix, Gervais et Grenier, sur la déclaration ci-dessus, prononcèrent une conviction contre Beauparlant, en ces termes : "Qu'il soit notoire que, le vingt-troisième jour de mars 1865, dans le district de Richelieu, Hercule Beauparlant, commerçant de la paroisse de Saint-Aimé,dit district,est trouvé coupable, par les soussignés François Gervais et Louis-Joseph Grenier, deux des juges de paix de Sa Majesté, dans et pour le district de Richelieu, d'avoir, ledit Hercule Beauparlant, audit lieu de Saint-Aimé, dit district, dans les maison et les lieux par lui occupés, vers le quinze janvier dernier (1865), vendu en détail, moins que trois gallons à la fois, certaines liqueurs spiritueuses ou boissons enivrantes, savoir du brandy et du whiskey, sans la licence prescrite en pareil cas, en contravention des Statuts Refondus pour le Bas-Canada. Et que nous, lesdits François Gervais et Louis-Joseph Grenier, condamnons ledit Hercule Beauparlant, pour ladite contravention, à payer, à titre d'amende, la somme de $50 qui sera prélevée et employée conformément à la loi, et aussi à payer audit Aimé Roy la somme de trois livres, dix-sept chelins, trois deniers, pour ses frais en cette cause. Et, si lesdites sommes ne sont pas payées immédiatement, nous ordonnons qu'elles soient prélevées par la saisie et vente des meubles et effets du défendeur, et, à défaut de meubles et effets suffisants, nous condamnons ledit Hercule Beauparlant à être emprisonné dans la prison commune du district de Richelieu, pour le terme et espace de deux mois de calendrier, à compter du jour de son incarcération, à moins que lesdites diverses sommes et les frais de ladite saisie et vente, ou d'emprisonnement, s'il y a lieu, ne soient plus tôt payés." Le 13 juin 1865, après avoir donné les avis voulus par la loi, Hercule Beauparlant, par ses avocats, fit motion pour un bref de *certiorari*, et produisit au soutien de cette motion un affidavit circonstancié contenant les moyens suivants, savoir : "qu'il a été assigné, le vingt-et-unième jour de mars dernier, à comparaître en la ville de Sorel, dans le district de Richelieu, le 23 mars dernier, devant François Gervais, juge de paix dans et pour ledit district, ou devant tel autre juge de paix dudit district, pour répondre, là et alors, à la plainte portée contre lui par Aimé Roy, percepteur du

revenu de l'intérieur pour ledit district de Richelieu, au nom de Notre Souveraine Dame la Reine, pour les motifs déduits dans la déclaration y annexée ; que le déposant a fait défaut ; que le 23 mars 1865, en la ville de Sorel, le déposant, qui n'a pas comparu, a été trouvé coupable par François Gervais et Louis-Joseph Grenier, deux des juges de paix de Sa Majesté, dans et pour le district de Richelieu (Il cite les termes de la conviction) ; que le déposant a été et est lésé par ladite conviction qui doit être cassée pour plusieurs raisons : 1° Parce que les juges de paix n'avaient aucune juridiction au regard de ladite poursuite ou plainte ; 2° Parce que la plainte n'expose pas une offense légale quelconque contre le déposant ; 3° Parce que, par la plainte, il n'appert pas et il n'est pas allégué que le déposant n'était pas distillateur dûment licencié, sous l'autorité du chapitre 19 des Statuts Refondus du Canada, ni n'était pas non plus marchand ni commerçant, qui, sous les dispositions du chapitre 6 des Statuts Refondus pour le Bas-Canada, peuvent, par licence, vendre des liqueurs spiritueuses ; 4° Parce que, par la plainte, il n'appert pas que le déposant ait vendu ou détaillé aucune liqueur spiritueuse, en quantité moindre que celle indiquée par la loi ; 5° Parce que la plainte n'expose pas que la prétendue offense y désignée, ait été commise par le déposant, en l'absence des différentes qualifications contenues en la clause du statut imposant une pénalité, et que le manque d'allégués négatifs (negative averments) résultant des dispositions dudit statut a eu pour effet d'enlever toute juridiction aux juges de paix ; 6° Parce qu'il n'appert pas, avec certitude, en et par la conviction, à quelle époque la prétendue offense a été commise ; 7° Parce que la contravention dont il est parlé, en la conviction, est dite avoir été commise vers le 15 janvier dernier ; tandis que le jour précis auquel telle prétendue offense aurait été commise devrait y être indiqué ; 8° Parce que, par la conviction, les juges de paix ont ordonné qu'à défaut de meubles suffisants, le déposant serait emprisonné, ce qui est illégal, attendu que, par la section 37 du chap. 6 des Statuts Refondus pour le Bas-Canada, l'emprisonnement a lieu *à défaut de meubles et effets, ou dans le cas où ils seraient insuffisants* ; 9° Parce que, par la conviction, les juges de paix ont excédé leur juridiction en condamnant le déposant à l'emprisonnement, tandis que la loi ne leur donne pas ce pouvoir, ainsi qu'il appert à la forme de conviction marquée F dans ledit statut, et, partant, n'avaient aucune juridiction à ce faire ; 10° Parce que les juges de paix ont encore excédé leur juridiction, et n'avaient aucune juridiction pour condamner le déposant à un emprisonnement qui devait compter du jour de son incarcération, attendu que le statut 27 et 28 Vic., ch. 18, s. 48, l'a bien décrété pour les diverses périodes d'emprisonne-

ment mentionnées dans les sections 38, 39 et 40 du ch. 6 des Statuts Refondus pour le Bas-Canada, mais ne l'a nullement décrété pour les périodes d'emprisonnement mentionnées dans la s-s. 2 de la 37e section du ch. 6, sous les dispositions de laquelle loi les juges de paix ont prétendu agir, et qu'aucune loi ne les autorisait à ce faire ; que le déposant a donné l'avis légal et requis en pareil cas aux juges de paix de son intention de se pourvoir par bref de *certiorari* contre ladite conviction, et ce dans les six mois du prononcé de la conviction, et qu'il ne s'est pas écoulé six mois depuis le prononcé de la conviction.'

Jugement de la Cour Supérieure du 21 juin 1865, LORANGER, J. : " La cour, a rejeté et rejette ladite motion, avec dépens."

Cette cause fut portée en revision, où le requérant allégua, à part les moyens mentionnés dans son affidavit circonstancié, que Hercule Beauparlant a demandé l'émanation d'un writ de *certiorari* devant la Cour Supérieure, à Sorel, pour l'infirmation et cassation de cette condamnation, mais que la Cour Supérieure, le 21 juin 1865, a rejeté la motion du requérant, avec dépens, quoique les *juges de paix seuls aient comparu* par un avocat, A. E. Brassard, suivant sa comparution du 13 juin 1865, *et qu'ils n'ont droit à aucuns dépens, pas plus qu'ils ne sont tenus d'en payer.* La Cour de Revision confirma ledit jugement en tous points, avec dépens." (1) (1 *R. L.*, p. 467)

CAPACITE DE CONTRACTER D'UNE PERSONNE ACCUSEE DE MEURTRE.

COUR SUPÉRIEURE, Sorel, 31 mars 1869.

Coram LORANGER, J.

D.-Z. GAUTHIER *vs* FÉLIX JOUTRAS, *ès-qualité.*

Jugé : 1° Qu'une femme, accusée du meurtre de son mari, peut, dans l'époque intermédiaire de l'accusation et de la condamnation juridique, contracter un engagement valable pour se faire défendre de l'accusation.

2° Qu'un avocat peut réclamer en justice le montant d'obligations à lui consenties par l'accusée pour se faire défendre, lorsqu'aucune preuve de surcharge ou de contrainte morale n'est faite.

3° Que, dans l'espèce, les biens de la femme condamnée ayant été confisqués au profit de la Couronne, cette dernière ne pouvait s'emparer des biens qu'à la charge de payer l'obligation contractée comme susdit,

(1) Autorités citées par le requérant : Paley, *On Convictions*, édit. 1856, page 357 et 358 ; Statuts Refondus du Canada, chap. 19, secs 2, 3 et 4 ; Statuts Refondus du Bas-Canada, chap. 6, secs 1 et 22.

comme toute autre obligation, et que, si la Couronne n'eût pas fait remise des biens confisqués aux enfants de la condamnée, elle aurait été obligée d'acquitter ces obligations.

4° Que les enfants ayant eu la remise de ces biens sont aux droits comme aux obligations de la Couronne, et, partant, chargés de ces obligations.

5° Que ces enfants ne sont cependant tenus que *pro modo emolumenti*.

6° Qu'ils ne sont tenus de ces obligations que sur la part de leur mère dans la communauté, et non sur ses gains de survie qu'elle a perdus.

Le demandeur alléguait, dans sa déclaration, que, le 16 avril 1847, François-Xavier Joutras aurait contracté mariage avec Sophie Boisclair, Blondin et confrères, notaires ; que, durant leur communauté, ils auraient acquis certains biens mobiliers et immobiliers ; que de leur mariage seraient issus cinq enfants ; que, le 13 février 1856, François-Xavier Joutras aurait fait son testament, M.-E. Hart, notaire, par lequel il instituait Sophie Boisclair, son épouse, sa légataire universelle ; que Sophie Boisclair aurait, de même, fait son testament et nommé ledit Joutras son légataire universel ; que, le 31 décembre 1866, Joutras serait décédé, et que son épouse aurait accepté le legs à elle fait ; que le 8 janvier 1867, Sophie Boisclair a été accusée, conjointement avec Modeste Provencber, du meurtre de son mari ; que Provencher fut trouvé coupable et exécuté le 3 mai 1867 ; que Sophie Boisclair et Modeste Provencher auraient requis les services professionnels du demandeur, pour les défendre de l'accusation portée contre eux, et lui auraient consenti un billet de $500 ; que Sophie Boisclair a, de plus, consenti une obligation au demandeur, le 16 mars 1867, devant Précourt, notaire, pour $440, et une autre de $200, le 16 avril 1867 ; que, pour la sûreté du paiement desdites obligations, Sophie Boisclair aurait hypothéqué un immeuble y désigné ; que le demandeur a fidèlement rempli ses obligations vis-à-vis de Sophie Boisclair, et qu'elle ne lui a jamais donné un seul sou ; que la valeur de ses services est d'au moins $1500 qu'il réduit à $1140 ; que Sophie Boisclair, avant le 12 avril 1867, était propriétaire, tant en vertu dudit testament de son mari, Joutras, que par son contrat de mariage sus-cité, de beaucoup de biens mobiliers et de plusieurs immeubles ; que Sophie Boisclair fut condamnée à mort le 12 avril 1867, et ses biens confisqués au profit de Notre Souveraine Dame la Reine ; que le demandeur a fait apposer les scellés sur les biens de Sophie Boisclair, ce qui lui a occasionné des dépenses au montant de $97.18, somme qui, réunie à la somme sus-mentionnée, forme celle de $1237.18 ; que le défendeur a été nommé tuteur auxdits enfants mineurs ; que le défendeur, *ès-qualité*, est en possession de tous les biens de Sophie Boisclair, et, comme tuteur des enfants et héritiers de Sophie Boisclair, est tenu en loi, sur et à même lesdits biens, payer

et acquitter toutes dettes et créances légitimes, et, partant, celle du demandeur ; que c'est entre les mains et en la possession du défendeur, *ès-qualité*, que le gouvernement de Sa Majesté a remis les susdits biens. Conclusions ordinaires pour le paiement de la somme de $1237.18, avec intérêt et dépens. A cette action le défendeur plaida : 1° par une exception péremptoire, que Sophie Boisclair, ayant forfait à ses droits d'épouse envers son mari, Joutras, et ayant commis l'adultère avec Provencher, a perdu le droit de reprendre aucune part dans la communauté de biens entre elle et Joutras à la dissolution d'icelle. Sophie Boisclair, étant la meurtrière de son mari, ne peut en aucune manière avoir bénéficié de sa mort, soit en reprenant sa part de communauté, soit en appréhendant tous ses biens, en vertu du testament du 13 février 1856, fait par Joutras en faveur de Sophie Boisclair. Le demandeur ne peut réclamer du défendeur, *ès-qualité*, aucune somme de deniers que Sophie Boisclair peut s'être engagée de payer, le défendeur étant tuteur aux enfants mineurs de Sophie Boisclair et de Joutras, lesquels n'ont pas succédé à leur mère, ni en aucune manière que ce soit continué sa personnalité juridique, à cause de l'*attainder* dont Sophie Boisclair a été frappée ; que les biens de Sophie Boisclair, si aucuns elle avait, ont été confisqués au profit de la Couronne, du moment qu'elle a commis le meurtre dont elle a été trouvée coupable, lesquels biens la Couronne a, depuis, remis aux mineurs selon acte produit ; que, vu ce que ci-dessus allégué, le défendeur, *ès-qualité*, n'est pas tenu, en loi, de payer aucune somme de deniers au demandeur, pour les raisons portées en la déclaration. 2° Par une seconde exception péremptoire, il allégua : " que Sophie Bois-
" clair n'a signé le billet et les actes d'obligation, que sous
" l'empire de la crainte et par l'effet d'une contrainte morale
" indue, exercée sur icelle ; que le demandeur n'a jamais four-
" ni valable considération pour le billet et les actes d'obliga-
" tion ; qu'il y a surcharge de la part du demandeur, dans
" l'estimé de ses services professionnels rendus à Sophie Bois-
" clair ; que Sophie Boisclair ne pouvait s'engager, conjointe-
" ment et solidairement avec Provencher, pour payer une
" dette dont la cause première datait d'une époque antérieure à
" la dissolution de son mariage avec Joutras ; que Sophie
" Boisclair n'a signé le billet et les actes d'obligation que par-
" ce qu'elle y était poussée par Provencher ; que, réellement,
" le billet et les actes d'obligation n'étaient que pour les frais
" et les honoraires d'avocats dans la défense de Provencher."
Ledit demandeur répliqua : que, quand Sophie Boisclair a contracté avec le demandeur, elle a, dûment et légalement, contracté, et, partant, le demandeur est bien fondé, en loi, dans sa présente demande ; que la condamnation de Sophie

Boisclair, la confiscation de ses biens, comme susdit, et la remise d'iceux à ses enfants, par l'entremise du défendeur, leur tuteur, le tout fait et arrivé après les engagements, contrats, obligation et billet par elle faits en faveur du demandeur, pour valeur reçue, et pour bonnes et valables considérations, ne peuvent pas préjudicier aux droits du demandeur, et ne sont pas en loi un obstacle pour empêcher le demandeur d'être payé de son dû et de ses créances qu'il a sur les biens de Sophie Boisclair." L'acte de remise de la Couronne en faveur des enfants est rédigé en ces termes: " PROVINCIAL SECRETARY'S OFFICE, Ottawa, 3rd June, 1867. This is to certify that His Excellency the Administrator of the Government, in Council, has been pleased to remit and give over to the minor children, and a child unborn of the late François Joutras and of Sophie Boisclair, the latter now lying under sentence of death for murder, all such property of said Sophie Boisclair, as may now become escheated and reverted to the Crown, owing to the sentence for capital felony passed upon her. (Signed), WM MCDOUGALL, Secretary." Le demandeur fit entendre un témoin pour prouver que son compte n'était pas trop élevé; les autres faits furent prouvés ou admis.

PER CURIAM: Le 16 avril 1847, François Joutras et Sophie Boisclair contractèrent mariage, sous le régime de la communauté, dans laquelle tombèrent des conquêts meubles et immeubles. Du mariage naquirent cinq enfants dont le défendeur est le tuteur. Le 13 janvier 1856, les époux firent chacun leur testament s'instituant mutuellement légataires universels. Le 31 décembre 1866, Joutras mourut, et Sophie Boisclair, conjointement avec Modeste Provencher, furent accusés de l'avoir assassiné. Après leur arrestation, Provencher et la femme Joutras consentirent au demandeur, avocat de cette ville, un billet solidaire, au montant de $500, pour se faire défendre de l'accusation. Le 16 mars 1867, la femme Joutras consentit une seconde obligation pour le même objet, pour $440, et hypothéqua un conquêt immeuble de la communauté, et le 6 avril de la même année, une troisième obligation pour $200. Ces deux obligations étant données pour se procurer les services professionnels de deux autres avocats, et ceux de médecins devant servir comme témoins au procès; le demandeur s'engageant à fournir, à ses frais, le service de ces deux avocats et des médecins. Le même conquêt immeuble fut hypothéqué pour le montant porté en la troisième obligation. Le 12 avril 1867, Sophie Boisclair fut trouvée coupable du meurtre de son mari et fut condamnée à mort par la Cour du Banc de la Reine siégeant en juridiction criminelle en ce district; cette condamnation emporta mort civile, et confiscation de ses biens en faveur de la Couronne. A la requête du

demandeur, les scellés furent apposés sur les biens de la femme Joutras, et le 3 juin 1867, la Couronne fit remise et abandon de ses droits acquis par la confiscation aux enfants mineurs nés du mariage des époux Joutras qui sont en possession des biens de la communauté. Aujourd'hui, le demandeur réclame d'eux le montant des obligations ci-haut mentionnées, en capital et intérêt, et en sus $97.18, pour frais des scellés. La défense plaide que, par le meurtre de son mari, Sophie Boisclair a perdu tous les droits de communauté qui lui étaient échus par son mariage, et aussi ceux qu'elle aurait pu prétendre du testament de son mari; que les mineurs n'ont pas succédé à leur mère morte civilement, et n'ont point continué sa personnalité juridique; que les biens de Sophie Boisclair ont été confisqués au profit de la Couronne, du moment de la perpétration du meurtre, et qu'abandon leur a été fait de ses biens par la Couronne; que le billet et les obligations n'ont été signés que sous l'empire de la crainte et par l'effet d'une contrainte morale indûment exercée sur elle; que le demandeur n'a jamais fourni valable considération pour le billet et les obligations, et qu'il y a surcharge dans l'estimé de ses services professionnels. Par ses réponses le demandeur soutient qu'étant créancier de Sophie Boisclair, il a droit d'être payé sur ses biens qui sont en possession des mineurs. Les questions soulevées par ce litige sont les suivantes: 1° Dans l'époque intermédiaire de l'accusation du meurtre de son mari à sa condamnation juridique, Sophie Boisclair pouvait-elle contracter un engagement valable pour se faire défendre de l'accusation? 2° Si elle a pu valablement s'engager, le demandeur a t-il le droit de réclamer le montant qu'il demande par son action, en d'autres termes, les obligations de Sophie Boisclair doivent-elles être maintenues jusqu'aux montants qu'elles portent en l'absence d'une preuve contraire faite par la défense. 3° La Couronne, si elle n'eût pas fait remise des biens confisqués, aurait-elle été obligée d'acquitter ces obligations? 4° Les enfants aux droits de la Couronne sont-ils tenus de la même charge? 5° Jusqu'à quelle concurrence, la Couronne et les enfants sont-ils tenus de la créance du demandeur? 6° Sur quels biens sont-ils tenus? Ce qui soulève la question agitée par la défense relativement à la perte prétendue des droits résultant à Sophie Boisclair du testament de Joseph Joutras, et de sa communauté avec lui. 1° La question de validité de l'engagement a toujours été vivement controversée entre les auteurs. Les uns prétendaient que le prévenu d'un crime emportant mort civile ne pouvait plus faire d'aliénations. D'autres prétendaient que la faculté d'aliéner ne lui était interdite que du jour de la condamnation. Les deux parties citaient en leur faveur des lois romaines. Sans rapporter les raisons données

par les auteurs de cette question vive et longtemps prolongée, il me suffira de dire que le sentiment des meilleurs auteurs, celui qui paraît avoir été définitivement adopté, et qui me paraît être le plus humain, est que l'accusé, protégé par la présomption de son innocence, conserve l'intégrité de ses droits jusqu'à sa condamnation, et que, partant, il a la libre faculté de contracter comme s'il n'eût pas été prévenu d'un crime. Mais peut-il faire tous les contrats? Ici se présente une distinction que fait naître la confiscation qui est une des peines de son crime. Il a incontestablement l'administration de ses biens, il peut payer ses dettes et recevoir ses créances, mais il ne peut rien faire en fraude et au préjudice du fisc, dans le but de soustraire ses biens à la confiscation et de diminuer sa peine. Il peut aliéner ses biens à titre onéreux, mais il ne peut pas le faire à titre gratuit; la présomption existant en ce cas, qu'il l'a fait pour frauder le fisc. Ici Sophie Boisclair, en contractant des dettes pour se faire défendre, est-elle censée l'avoir fait pour frauder le fisc? Dans cette controverse, où sont cités des noms tels que ceux de Godfroy, Dumoulin, Cujas, LePrestre, Ricard, Lemaître et autres, je ne trouve que Papin qui parle d'un cas semblable, et qui dise "que l'on ne peut refuser à l'accusé la faculté d'aliéner, afin qu'il puisse se procurer sa subsistance, et pourvoir aux dépenses nécessaires pour prouver son innocence." Je trouve ce sentiment si conforme aux principes sur la matière, que je ne puis que l'adopter. En effet, il est impossible de dire qu'ici l'accusé a agi en fraude du fisc et dans l'intérêt d'un tiers. Je résous donc la première proposition en faveur de la demande. Il est bien entendu que c'est d'après le droit français que je juge cette proposition, car, d'après le droit anglais, l'accusé de félonie capitale et convaincu plus tard, ne peut, dans l'époque intermédiaire du crime à la conviction, aliéner en aucune façon les biens sujets à confiscation. Mais cette confiscation ne porte pas là comme en ce pays sur la totalité des biens du coupable. Les meubles seuls en sont passibles, et le droit de la Couronne sur ses immeubles, consiste seulement dans la jouissance de l'an et jour. *2me proposition* : Voyons maintenant jusqu'à quel montant le demandeur a le droit de recouvrer. La défense nie la valeur des services professionnels, allègue surcharge et contrainte morale. Disons de suite qu'elle n'a rien prouvé. Elle ne dit pas même en niant la valeur des services, à quel chiffre ils se sont élevés. De sorte qu'il me paraît que, si Sophie Boisclair avait le droit de s'engager pour rémunérer ces services, la valeur qu'elle y a attachée elle-même doit être accordée au demandeur. Je ne lui accorderai cependant pas les frais de scellés dont il doit supporter les dépens comme de toutes autres mesures conservatoires, faites par les créanciers.

3me proposition : La Couronne, si elle n'eût pas fait remise de ses droits, était tenue des dettes de Sophie Boisclair, c'est une des conditions de la confiscation que le confiscataire prenne les biens à la charge des dettes. Le contraire serait une violation des droits des créanciers. Ce serait enrichir le fisc à leur préjudice que de lui attribuer les biens sans la charge des dettes. Ce serait même contrevenir au principe de la confiscation qui n'est pas d'enrichir le fisc, mais d'imprimer l'horreur du crime au criminel par la pensée de la misère de ses enfants, s'il encourt une peine qui emporte confiscation et par là de le détourner du crime. Aussi les auteurs enseignent-ils unanimement que le fisc prend les biens à la charge des dettes. *4me proposition* : Il n'est pas non plus douteux que les héritiers du condamné à qui la Couronne fait remise de la confiscation ne soient tenus de ses dettes. Ce n'est cependant pas comme héritiers du condamné, car ses biens ont été, en entier, dévolus à la Couronne ; mais c'est comme représentants de cette dernière, et à ses charges aussi bien qu'à ses droits ; c'est aussi comme possesseurs des biens de l'accusé qu'ils sont tenus des charges. *5me proposition* : Mais ce n'est pas indéfiniment qu'ils sont tenus de la dette, parce que ce n'est pas comme héritiers qu'ils le sont. C'est jusqu'à concurrence des profits qu'ils retireront de ces biens, *pro modo emolumenti*, qu'ils devront contribuer aux dettes. *6me proposition* : Quels sont les biens sur lesquels ils sont tenus ? Cette proposition soulève la question des effets qu'a produits le meurtre commis par la femme Boisclair sur son mari, en rapport avec le testament fait en sa faveur et ses droits de communauté. Il est incontestable que Sophie Boisclair ayant attenté aux jours de son mari, a été, par le fait même, déchue du legs contenu au testament de ce dernier. Le légataire ou héritier qui attente aux jours du testateur, est privé du bénéfice du testament. Mais a-t-elle perdu ses droits dans la communauté comme le prétend la défense ? La femme qui attente aux jours de son mari perd ses gains nuptiaux et de survie, mais la communauté n'est pas un gain nuptial ni de survie. Elle est considérée, sous les rapports intéressés, comme une société ordinaire, sur laquelle le meurtre commis par un associé sur la personne de son co-associé, n'a d'autre effet que celui de la dissoudre, sans affecter en aucune manière leurs rapports intéressés. Les droits de Sophie Boisclair dans la communauté sont donc passés à la Couronne par sa condamnation, et de la Couronne à ses enfants. Les biens sur lesquels le demandeur a le droit de se venger de la dette sont donc ses droits dans la communauté, et les enfants ne sauraient être tenus que jusqu'à concurrence de ce qu'ils ont amendé de ces biens. Il y a exclusion du douaire, par le contrat de mariage, et en attentant à la vie de

son mari, Sophie Boisclair a perdu ses droits au préciput stipulé en sa faveur, ce préciput étant un gain de survie. Je ne puis donc prononcer maintenant de jugement final sans connaître le montant de l'émolument retiré par les enfants, en d'autres termes, la valeur des biens qui leur ont été dévolus, en vertu de la remise de confiscation faite par la Couronne, et il me faut ordonner une expertise en ce sens.

JUGEMENT INTERLOCUTOIRE : " Considérant que la condamnation à mort prononcée contre Sophie Boisclair, le 12 avril 1867, par la Cour du Banc de la Reine, siégeant en juridiction criminelle en ce district, sur conviction de meurtre, avec préméditation, de François-Xavier Joutras, son mari, laquelle condamnation a emporté mort civile, n'a pas eu d'effet rétroactif à la sentence, et que, jusqu'au moment de ladite sentence, Sophie Boisclair a conservé, dans leur intégrité, ses droits civils, entre autres, le droit de contracter des dettes pour cause légitime et sans fraude envers le fisc ; considérant que, lors de la passation des divers billets et obligations mentionnés en la déclaration, et dont le demandeur poursuit le recouvrement, Sophie Boisclair était ainsi en possession de ses droits civils, et que la cause de ses obligations est une cause légale, l'engagement contracté par un accusé, pour pourvoir à le défendre de l'accusation, n'étant pas censé l'être pour une cause illicite ou réprouvée par la loi, et n'emportant pas avec lui de présomption de fraude contre le fisc, fraude qui n'est prouvée dans la présente espèce par aucun fait extérieur et qui, partant, n'est nullement établie ; considérant que le défendeur, ès-qualité, n'a fait preuve d'aucun des faits par lui invoqués dans ses défenses, et, notamment, de la contrainte morale ou intimidation exercée sur Sophie Boisclair, et qu'il n'a pas non plus prouvé que la valeur des services professionnels du demandeur fut moindre que celle portée auxdits billets et obligations, et qu'en l'absence de cette preuve, le tribunal doit prendre l'estimation qu'a faite Sophie Boisclair comme base de l'estimation d'iceux ; considérant que la confiscation des biens de Sophie Boisclair, opérée en faveur de la Couronne par ladite condamnation, a été par elle remise aux enfants de Sophie Boisclair, représentés par le défendeur, leur tuteur, mais que cette remise n'a été faite qu'aux charges auxquelles les biens confisqués ont été dévolus à la Couronne elle-même, savoir à la charge des dettes de Sophie Boisclair, et entre autres, de celle du demandeur ; considérant, cependant, que les enfants de Sophie Boisclair, pas plus que ne l'a été la Couronne, ne sont pas indéfiniment tenus des dettes, mais seulement jusqu'à concurrence de leurs profits dans les biens dévolus, *pro modo emolumenti*, et qu'avant de connaître le chiffre de cet émolument, et la valeur des biens dévolus qui ne

peuvent consister que dans la part de communauté de Sophie Boisclair avec François Joutras, il est impossible de porter aucune condamnation, et qu'il y a, partant, lieu d'ordonner une expertise constatant la valeur de ladite part de communauté, avant de prononcer aucune sentence définitive, ordonne, avant faire droit, que, d'hui au 1er jour juridique du terme prochain de cette cour, le défendeur rendra un compte juste et fidèle des biens qui sont dévolus aux enfants mineurs issus du mariage desdits François Joutras et Sophie Boisclair, en vertu de la remise faite auxdits enfants par la Couronne, le 3 juin 1867, de la valeur desdits biens, des profits que les enfants mineurs en ont retirés, déduction des dépenses faites, tant pour obtenir ladite remise que pour exploiter et administrer lesdits biens, le demandeur ayant droit de contester ledit compte s'il le juge convenable, pour sur le tout être ordonné ce que de droit. (1 *R. L.*, p. 473, et 2 *La Thémis*, p. 82)

SUCCESSION.—HERITIER.

COUR SUPÉRIEURE, Sorel, 31 mars 1869.

Présent : LORANGER, J.

JOSEPH DESAUTELS *vs* MARIE LARUE.

Jugé : 1° Qu'un donateur, appelé par la loi à la succession de son fils, ne peut, sans renoncer à la succession, repousser les obligations qu'entraîne sa qualité d'héritier, et réclamer de la veuve du défunt, en sa qualité d'usufruitière de ses biens, une dette à lui due par son fils sur ses propres, et qu'il y a, en ce cas, confusion des qualités de créancier et de débiteur.

2° Qu'il ne peut pas même réclamer de la veuve usufruitière les intérêts des capitaux qui lui étaient dus par son fils.

PER CURIAM : Par acte de donation entre vifs, fait le 1er avril 1861, devant Payan, notaire, le demandeur et Marie-Anne Verrier, sa femme donnèrent certains biens à Joseph Desautels, leur fils, maintenant décédé, en son vivant époux de la défenderesse, Marie Larue. Joseph Desautels avait, moyennant cette donation, promis payer $350 au demandeur, avec intérêt au taux de 12 par cent. Le 2 février 1865, Joseph Desautels épousa la défenderesse, et, par son contrat de mariage, il y eut constitution d'usufruit de tous les biens du premier mourant en faveur du survivant. Joseph Desautels, fils, est décédé intestat le 5 février 1867, laissant le demandeur, son père, comme plus proche parent successible, et la défenderesse a pris possession de son usufruit. La présente action est portée en recouvrement du capital et intérêts, contre la défen-

deresse, comme usufruitière, et le demandeur conclut à condamnation personnelle, si mieux n'aime la défenderesse remettre les biens chargés d'usufruit, sinon à ce que l'acte de donation soit cassé, pour défaut d'exécution des charges ; le demandeur concluant à tout événement à ce que la défenderesse soit condamnée à payer les intérêts du capital, comme représentant les charges des biens chargés d'usufruit. La seule défense qui, pour les fins de la contestation utilement liée entre les parties, et l'exposé de la question, se présente réellement, est celle-ci : la défenderesse prétend que le demandeur, étant avec sa femme, héritier de son fils, Joseph Desautels, ne peut rien réclamer d'elle, en sa qualité d'usufruitière, à raison de dettes passives du défunt, et qu'il y a eu confusion des qualités de créancier et débiteur en sa personne. Dans ses réponses, le demandeur nie avoir accepté la succession du défunt Joseph Desautels et soutient que, comme commune en biens, la défenderesse doit la somme demandée, mais peut-il changer son action portée contre la défenderesse comme usufruitière, ce qu'évidemment il n'a pas le droit de faire. Il restera sa prétention relative à l'obligation de la défenderesse de payer les intérêts du capital comme représentant les charges de l'usufruit. Trois questions se soulèvent ici : 1° *Le demandeur, appelé par la loi à la succession de son fils, peut-il, sans y renoncer, repousser les obligations qu'entraîne sa qualité d'héritier ?* Dans les circonstances, peut-il réclamer de la défenderesse, usufruitière du défunt, une dette due par son fils ? N'y a-t-il pas, dans sa personne, confusion des qualités de créancier et débiteur qui repousse sa demande ? S'il ne peut réclamer le capital, ne peut-il pas au moins réclamer les intérêts, comme charge des biens donnés en usufruit ? Deux maximes du droit commun se livrent ici un combat apparent, et, de leur conciliation, naît la solution de la première question. " Le mort saisit le vif," dit la coutume. " Nul n'est héritier qui ne veut," ajoute la même coutume. Le demandeur dit : " Je n'ai pas voulu être héritier, je n'ai pas accepté la succession ; conséquemment je ne puis être traité comme héritier, et tous mes droits contre la succession sont restés en vigueur." Cette question remonte aux principes fondamentaux du droit coutumier sur les successions. D'après ces principes, en mourant, un homme saisit, de plein droit, de l'universalité de ses biens, de ses droits comme de ses obligations, son héritier qui continue ainsi la personalité juridique du défunt. L'intérêt de la société, les droits des tiers, la faveur de l'héridité, réclament cette transmutation rapide, cette substitution de personnes opérée par un instant de raison. Pas n'est besoin d'inventaire, de délivrance, pas de délai, pas de délibération, pas d'acceptation. Par une de ces fictions dont le droit seul est capable, il sup-

pose que le défunt n'a pas cessé de vivre, ou, plutôt, il le ressuscite en la personne de l'héritier. Mais cette saisine est un bienfait de la loi, et, en vertu de la règle du droit antique, *Quodcuique (pro eo) prestatur non invito tribuitur*, ne saurait tourner au préjudice de l'héritier, en lui rendant fatale une disposition faite en sa faveur. Ce qui arriverait si jamais il ne pouvait répudier une succession onéreuse. Aussi, tel n'est pas le cas, les choses étant entières, et tant qu'il ne s'est pas immiscé, il peut renoncer à la succession. Mais, aussi longtemps qu'il n'a pas renoncé, il est traité comme héritier. Son abstention n'est pas suffisante pour le soustraire aux charges de l'héridité. Il ne lui est pas suffisant de dire, je n'ai pas accepté, ou je me suis abstenu pour lui faire obtenir congé de l'action des tiers. Il doit défendre, payer ou renoncer, sinon, on le condamne. La loi ne veut pas laisser en suspens l'héridité flottante sur la tête des divers héritiers en dégrés égaux ou inégaux, en butte à leurs caprices, ou en proie à leurs incertitudes. Ennemie des temporisations qui pourraient paralyser la liquidation, elle veut une dévolution prompte et assurée. C'est sur ces principes qu'ont été rendus une foule d'arrêts qui ont condamné aux dépens des héritiers qui, poursuivis pour des dettes de la succession, sans s'être immiscés, et aussi sans avoir renoncé avant l'action, ne l'ont fait qu'après avoir été mis en cause, et que je décide, qu'en la présente espèce, le demandeur, n'ayant pas renoncé, doit être traité comme héritier de son fils, vis-à-vis la défenderesse. Etant ainsi héritier de son fils, peut-il réclamer de la défenderesse une créance due par le défunt? Voilà la seconde question. Encore ici se présente la considération des effets que produit la représentation du défunt par l'héritier, sa perpétuation en la personne de ce dernier. Le demandeur, héritier de son fils, à sa qualité de créancier a joint celle de débiteur, et il s'est opéré en sa personne une confusion qui, incontestablement, lui refuse toute action, au regard de dettes passives; mais, quoiqu'il ne le dise pas *expressis verbis* dans sa déclaration, il le dit suffisamment en disant que la défenderesse accepte la communauté, que, dans cette communauté est entrée la créance qui a cessé d'être la dette de son fils, mais qui est devenue celle de la communauté, et dont la défenderesse doit la moitié. A cela il y a deux réponses, la première est que la créance réclamée par le demandeur, a été contractée pour l'acquisition des immeubles donnés par l'acte du 1er avril 1861, lesquels, même au dire de la demande, sont des propres de communauté, et que cette communauté n'a jamais été tenue de cette créance. En effet, il serait souverainement injuste que la communauté qui n'a pas profité des immeubles, fût tenue de leur prix d'acquisition. La seconde, c'est que, par le contrat de mariage, il est stipulé

que chacun des conjoints sera tenu de ses dettes contractées avant le mariage. Supposant donc que cette dette serait tombée dans la communauté, et que, comme commune, la défenderesse en dût une partie, elle aurait un recours, en indemnité, contre le demandeur, comme héritier du conjoint décédé, si le créancier ici n'était pas le demandeur lui-même. *Qui de evitione tenetur eum agentem repellit exceptio*; le demandeur est mal fondé sur la seconde question. Il l'est encore sur la troisième, et encore à raison de sa qualité d'héritier, il est censé avoir fait lui-même la donation d'usufruit constituée en faveur de la défenderesse au contrat de mariage. Comment peut-il aujourd'hui vouloir charger l'usufruit de sa propre dette? Je sais bien que l'usufruitier est tenu de la contribution aux dettes, mais, évidemment, ce n'est pas aux dettes qui appartiennent en actif à l'héritier de l'auteur de l'usufruit. Sur tous les points j'estime donc que le demandeur est mal fondé dans sa demande, et qu'il en doit être débouté.

JUGEMENT: " Considérant que le demandeur, étant l'héritier légitime de Joseph Desautels, l'époux de la défenderesse, à la succession duquel il n'a pas renoncé, ne peut réclamer de la défenderesse, ni comme usufruitière des biens délaissés par ledit Joseph Desautels, ni comme commune en biens avec ce dernier, le prix des propres dudit Joseph Desautels, vendus ou donnés à échange par le demandeur, lequel prix n'est pas entré dans la communauté, comme dette passive, et que cette inhabilité s'applique aussi bien aux intérêts qu'au capital; considérant que, si l'usufruitier est tenu de la contribution aux dettes de la succession, il ne peut l'être sur action directe intentée contre lui par l'héritier de l'auteur de l'usufruit, ainsi que le fait le demandeur; considérant, enfin, que le surplus de la demande est sans preuve, et que le demandeur doit être débouté de ses conclusions en entier; a débouté et déboute le demandeur de son action. (1 *R. L.*, p. 485, et 2 *La Thémis*, p. 90)

APPEL AU CONSEIL DE COMTE.

COURT DE CIRCUIT, pour le comté d'Yamaska,
St-François-du-Lac, 21 octobre, 1861.

Coram BADGLEY, J.

FRANÇOIS LAFOND *et al.* *vs* ISAIE BOISVERT *et al.*

Jugé : 1° Que, lorsqu'il y a appel d'une décision d'un conseil local au conseil de comté, en vertu de la sec. 66, ch. 24, de l'Acte Municipal Refondu du Bas-Canada, le conseil de comté doit être considéré comme tribunal judiciaire dont les décisions sont des *jugements* analogues à ceux des tribunaux ordinaires.

2° Que des jugements rendus par les conseils de comté siégeant en tribunal d'appel, il y a appel à la Cour de Circuit, en vertu de la sec. 67 dudit Acte Municipal.

Cet appel a été porté par les appelants contre une décision rendue par le conseil de comté d'Yamaska revisant un procès-verbal de chemin. Les intimés, sur la présentation de la requête d'appel, s'objectèrent à la réception de cet appel, prétendant que la décision du conseil de comté était un acte d'administration de la corporation du comté, et ne pouvait pas être considérée comme un jugement rendu sur litige ; que la sec. 67 de l'Acte Mnnicipal n'accorde l'appel que des jugements rendus sur l'Acte Municipal par un tribunal judiciaire. Les appelants prétendirent que le conseil de comté se trouvait, par la loi, érigé en tribunal spécial d'appel, et que les décisions de ce tribunal d'appel étaient des jugements judiciaires analogues aux jugements des cours de justice ordinaires. La cour a adopté les prétentions des appelants, et a maintenu le droit d'appel, pour les raisons sus-citées. (1 *R. L.*, p. 494)

OBLIGATIONS DE LA FEMME POUR SON MARI.

COUR SUPÉRIEURE, Saint-Hyacinthe, 10 janvier 1870.

Coram SICOTTE, J.

LA SOCIÉTÉ DE CONSTRUCTION DE SAINT-HYACINTHE, demanderesse, *vs* BRUNELLE *et vir*, défendeurs.

Jugé : 1° Que la femme mariée et séparée de biens ne peut s'engager, en aucune manière, pour les affaires de son mari, et que, si elle le fait, son engagement sera cassé et annulé comme fait en fraude et en violation des lois *d'ordre public.*

2° Que, pour savoir si l'obligation contractée au nom de la femme seule, l'a été pour les affaires de son mari, il convient de s'enquérir de

toutes les circonstances dans lesquelles l'obligation a été contractée, et d'avoir égard aux présomptions qui découlent des faits prouvés.

3° Que, dans l'espèce, bien que l'obligation ait été contractée par la défenderesse seule, en faveur de la demanderesse, il résulte des faits prouvés, que la demanderesse a contracté avec le mari de la défenderesse, et que cette dernière a consenti une obligation hypothécaire, en faveur de la demanderesse, pour compléter et assurer les transactions de son mari.

Hilaire Mathieu a fait application au bureau de la demanderesse pour un emprunt d'argent, et a offert, comme sûreté, des hypothèques sur les biens de sa femme. Ses propositions ont été acceptées par la demanderesse, et lorsqu'il s'est agi de passer l'obligation, la demanderesse, par ses directeurs, a exigé que l'obligation fût consentie par la femme de Hilaire Mathieu, savoir la défenderesse. Lorsque l'obligation est devenue due, la défenderesse Brunelle, femme de Hilaire Mathieu, a refusé de payer et a été poursuivie sur l'acte d'obligation qu'elle avait consenti. A cette poursuite, elle a plaidé les faits ci-dessus rapportés, et la Cour lui a donné gain de cause.

Voici les motifs donnés par le savant juge SICOTTE, à l'appui de son jugement, dans des notes manuscrites que nous reproduisons : "Il s'agit du recouvrement des deniers qui, d'après l'acte invoqué, paraissent avoir été empruntés par et pour la femme. Cette dernière repousse la demande, en disant qu'elle n'est intervenue que pour continuer l'emprunt sollicité par son mari, et réellement fait pour son mari, quoiqu'il ait été stipulé dans l'acte, un prêt fait à elle et pour elle. La loi déclare nuls et inefficaces, absolument, tous engagements, cautionnements, obligations, faits ou contractés durant le mariage, par la femme séparée, qui ont pu lui faire encourir aucune responsabilité, à raison de contrats, d'engagements faits par son mari. Comme le tribunal le remarquait, dans une autre cause de même nature, il ne peut y avoir de discussions sur l'opportunité de la loi, sur ses avantages ou inconvénients; mais, quand la femme articule, comme elle le fait dans l'espèce, la violation de la loi, il n'y a qu'à s'enquérir si, réellement, le prêt a été fait au mari et pour le mari. Ce fait constaté, la question de fraude à la loi est décidée. Toute violation de la loi, dans les matières civiles, rarement se présente avec un aveu explicite à la face des actes de la transaction. Elle est assez ingénieuse pour se cacher sous des apparences de vérité et de légalité. Elle ne serait pas la fraude, s'il en était autrement. Il faut bien, dans ces cas, chercher la vérité, dans la preuve testimoniale, dans les indices, dans les présomptions. Il y a des présomptions légales, comme celle qui se présentera souvent dans la matière dont il s'agit. La loi défend à la femme séparée de s'engager avec son mari. Or, quand la femme apparaîtra s'être obligée avec son mari, la présomption légale sera qu'elle s'est obligée pour lui. C'est la responsabilité qu'elle

prohibe. Les autres présomptions résultent de toutes les considérations qu'un homme impartial fonde sur la position des parties, sur leurs rapports, leurs intérêts, leurs habitudes, sur les conséquences nécessaires de faits connus à des faits présumés, et, souvent, sur la nature particulière du contrat. Les présomptions doivent être précises, résulter de faits ayant une connexité évidente avec ceux dont on cherche la preuve ; elles doivent être concordantes et graves. Les auteurs indiquent la route qu'il faut suivre pour découvrir la fraude et les simulations. C'est, d'abord, par une discussion exacte et un examen attentif des faits. La meilleure règle est que l'on considère ce qui a précédé et ce qui a suivi les actes argués de fraude, le caractère des conventions mêmes, celui des personnes qui ont contracté. La première chose connue est une demande du mari aux demandeurs, en date du 1er septembre, faite en son nom seul, d'emprunter pour lui la somme de $900.00, avec des conditions de paiement, d'intérêt et de garanties précises et bien indiquées. Cette demande d'emprunt a été remise au secrétaire trésorier des demandeurs par le mari. Il n'a été nullement question de la femme. Cette demande est soumise aux demandeurs le 3 de septembre, et, le même jour, elle est accordée dans les termes suivants, qu'on trouve dans le registre de leurs procédés : " Les directeurs décident de prêter à Hilaire Mathieu, " la somme de $900.00, pour 4 ans, à douze par cent, sur la garantie offerte." La femme n'a fait aucune démarche, aucune demande, auprès des directeurs. Mais il est expliqué par l'un d'eux, Buckley, qu'il y eut, dans l'assemblée, quelque discussion sur la légalité de prêts faits aux femmes séparées, mais que lui était d'opinion qu'elle pouvait emprunter pour elle, *for herself.* Un autre directeur, Turcot dit: "Une application nous a été sou- " mise de la part du défendeur, Hilaire Mathieu ; nous avons " refusé d'y avoir égard, et nous avons engagé le président et " le secrétaire d'en informer Mathieu, lui intimantque les direc- " teurs ne voulaient pas lui prêter la somme demandée, atten- " du que les propriétés qu'il offrait en garantie ne lui appar- " tenaient pas." La demande, faite par Mathieu, fut donc considérée avoir été faite pour lui, et non de la part de sa femme. Un autre directeur, Dessaulles, dit qu'il a été procédé sur une demande par écrit. Or, il est constant qu'il n'a été fait et présenté qu'une demande par écrit, et au nom de Mathieu seul. Il n'y a pas eu d'autre demande et le secrétaire le constate positivement. Desprès dit: "J'ai reçu cette appli- " cation de Mathieu, et je l'ai soumise aux directeurs le 3 sep- " tembre, et il a été résolu, par les directeurs, que cette sou- " mission d'Hilaire Mathieu était acceptée, sur la garantie " offerte dans la soumission même." Le secrétaire nous apprend, avec autant d'exactitude que de précision, ce qui s'est réelle-

ment passé à cette assemblée du 3 septembre. "Les directeurs " ont décidé de faire le prêt sur la garantie offerte, cette " garantie appartenant à la défenderesse; les directeurs ont " décidé de ne pas prêter au défendeur, Hilaire Mathieu, mais " de prêter à sa femme, sur la garantie offerte." Dans une autre partie de sa déposition, il dit: "C'est à la séance du 3 " septembre que les directeurs en sont venus à la décision finale relativement au prêt." Cette fois, ils ont décidé d'accepter la soumission de Mathieu, et de prêter la somme demandée par cette soumission, mais, comme la garantie offerte consistait en des propriétés de la défenderesse, ils décidèrent que la somme serait prêtée à la défenderesse, et que l'obligation et l'hypothèque seraient données par elle. Il est constant qu'avant cet emprunt, le mari était sans ressources, et en dehors de tout négoce. Voilà les faits qui ont précédé l'acte. Quels faits ont suivi ? Le mari, sans ressources, fait presqu'immédiatement après la consommation de l'emprunt des achats considérables de marchandises, et paie à deux de ses fournisseurs seulement près de $700. Il n'est fait aucune amélioration sur les héritages de la femme, il n'est payé aucune dette pour elle. La femme n'avait nul besoin de cet argent, ses biens suffisaient pour fournir l'existence de la famille. Le secrétaire, Desprès, ne peut dire d'abord précisément lequel des deux a pris l'argent; cependant il pense que le mari a pris le tout; puis, qu'il a remis le papier à sa femme et qu'il a gardé l'argent dur. Si ces dires pouvaient avoir quelque influence sur le procès, il faudrait dire qu'ils constatent qu'elle a signé cet acte sur les obsessions et sur les sollicitations de son mari seulement; et, aussi, que ce dernier exerce une influence entière et absolue sur elle, qu'il administre ses biens à sa guise, que les deniers empruntés n'étaient pas pour elle, mais pour le commerce que son mari voulait faire, et que ce fait fut intimé aux demandeurs présents, lorsque l'acte fut passé. Résumons succinctement les faits et circonstances de la cause. Le mari sollicite un emprunt; cette demande a été traitée, considérée, comme faite pour lui, et pour ses affaires; l'emprunt a été accordé; intimation a été donnée au mari, que la demande faite par lui avait été acceptée. La garantie offerte étant par des propriétés appartenant à la femme, on a intimé au mari que sa femme serait ostensiblement l'emprunteur et qu'elle donnerait l'obligation de l'hypothèque. L'acte est pour la même somme, sous les même conditions de paiement d'intérêts, de garanties, que celles offertes par le mari. Immédiatement après, le mari, qui n'avait aucune ressource, ouvre magasin dans une paroisse voisine, et paie près de $700 à deux seulement de ses fournisseurs. Appliquons ces faits connus, les présomptions et les affirmations qui en découlent, au fait qui

est en contestation, savoir que le prêt a été fait au mari, pour ses affaires et à sa demande individuelle. C'est lui qui agit, parle, reçoit et emploie l'argent. C'est à lui qu'on accorde le prêt, mais il devra, avant de toucher les deniers, faire apparaître sa femme pour *signer l'acte et donner l'hypothèque*. L'interposition de la femme à sa place ne change pas le fait, ni la nature du contrat; c'est seulement question de garantie du remboursement de la somme que le mari a fournie au créancier, c'est moyen d'assurer le paiement de son engagement. Il y a simulation, quand on suppose une cause de convention dans l'acte et qu'il y en avait réellement une autre; qu'on rédige une convention et qu'il a été toutefois fait une convention différente. La raison des choses, la conséquence logique des faits et des circonstances conduisent sérieusement à la conclusion, que c'est là la simulatian qui a été pratiquée dans l'espèce. La simulation, une fois constatée, détermine l'espèce de fraude commise. En cas de fraude, quand la vérité vient à se connaître, elle l'emporte toujours sur la simulation, quoique le contrat accusé de simulation paraisse légitime et parfaitement légal. Il ne s'agit plus, dans ces circonstances, que de connaître quelle a été la véritable intention des parties. La règle de droit est toujours *plus valere quod agitur quàm quod simulate concipitur*. Cujas, en répétant cette règle, donnait l'exemple suivant, qui a tout son à-propos dans l'espèce: "Si un particulier achète un fonds de ses deniers, " mais que, pour frustrer ses créanciers, il fasse apparaître sa " femme comme acquéreur; cette feinte n'empêchera pas les " créanciers d'exercer leurs droits sur ce fonds." Les créanciers peuvent-ils frustrer la femme, frauder la loi en la faisant apparaître obligée, quand, de fait, ils ont traité et transigé avec et pour le mari, mais qui ne peut leur donner de garanties suffisantes? Il y a eu convention certaine, définitivement arrêtée, de laisser avoir à Mathieu l'argent demandé par lui et pour lui; il n'y a eu de changé que le mode dans la garantie. Mathieu offrait de garantir son remboursement par des hypothèques sur des héritages appartenant à sa femme. Il ne pouvait arriver à ce résultat qu'en la faisant obliger avec lui et pour lui, comme sa caution; sa demande comprenait cela; les créanciers l'ont compris ainsi, et ils ont dit à Mathieu: " Vous " aurez l'argent, mais, comme les propriétés appartiennnent à " votre femme, c'est elle qui donnera l'obligation et l'hypo- " thèque." N'est-il pas évident que la chose qu'on a voulu faire, qu'on a faite, est un prêt à Mathieu, tel qu'il l'avait demandé? Comme la forme, proposée par le mari, était illégale à sa face, on a déguisé la chose, mais la même chose toutefois, par la rédaction d'une convention qui se présente avec l'apparence de la légalité. La chose défendue directement ne

peut valoir davantage si elle est faite indirectement. La vérité étant connue, la règle recevra la même application. La cause de l'acte est fausse, et sciemment, l'énonciation de la cause a eu pour objet de déguiser un contrat déclaré nul par la loi, en lui donnant la forme d'un contrat licite. La preuve que la femme ne s'est obligée que pour cautionner l'emprunt de son mari, est la conséquence nécessaire, inévitable des faits connus. Dans l'espèce, la simulation se présume, non-seulement des faits connus, mais il y a, de plus, la preuve de la cause et du motif qui y ont donné lieu ; c'est l'affirmation d'un fait qui équivaut à la présomption de droit. La connaissance du motif de la simulation explique et prouve la fraude à la loi. Les demandeurs accusent injustement la loi de favoriser la fraude. Si tel est le cas, le remède est dans les mains des capitalistes, et aussi simple que facile ; il consiste à ne pas prêter aux femmes mariées ; mais ils n'ont aucune raison de se plaindre, quand ils prêtent au mari et prennent l'obligation et l'hypothèque de la femme. La loi n'a pas été faite contre le capital ; elle avertit le capitaliste et le met sur ses gardes. La loi a été faite contre les créanciers qui, ayant une mauvaise dette contre le mari, veulent la faire bonne par la garantie de la femme ; elle a été faite contre les capitalistes qui spéculent sur la faiblesse, l'ignorance des femmes, sur le scandale d'un procès, pour demander davantage ; elle a été faite pour protéger la femme contre les dissipations du mari, contre ses obsessions, contre ses mauvais traitements. Ces observations ne s'adressent, en aucune manière, aux créanciers dans cette instance ; mais on comprend que ce n'est pas parce qu'un honnête créancier aura mal interprété la loi, ou qu'il lui aura donné une interprétation judaïque, que la loi ne devra pas recevoir son application. A moins de dire que, toutes les fois que des créanciers, après avoir acquiescé aux demandes du mari, ne trouvant pas ses garanties offertes valables ou suffisantes, parce qu'il aura offert de se faire cautionner par sa femme, mais ayant fait consentir cette dernière à faire déclaration dans l'acte qui termine la transaction, qu'elle emprunte la somme pour elle-même, ils n'ont pas fait fraude à la loi ; il faut décider que, dans l'espèce, il a été fait ce que la loi a voulu empêcher et a prohibé. Action déboutée." (1 *R. L.*, p. 557)

PAPINEAU et MORISSON, proc. de la demanderesse.

R.-E. FONTAINE, proc. de la défenderesse.

ACTE D'ACCUSATION.—PARJURE.—PREUVE.

COUR DU BANC DE LA REINE, Montréal, 9 mars 1870.

Coram DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J.

REGINA *vs* PELLETIER et TELLIER.

Jugé: Qu'un acte d'accusation pour parjure, basé sur un serment qu'on allègue avoir été fait devant le "juge des Sessions générales de la Paix dans et pour ledit district" (de Montréal), au lieu de (ainsi que cela avait lieu), devant le "juge des Sessions de la Paix dans et pour la cité de Montréal" (telle était la véritable dénomination du juge), peut être amendé après le plaidoyer de non coupable.

2° Que, lorsque deux complices d'un acte criminel sont accusés dans deux actes d'accusation séparés, d'avoir commis l'acte conjointement, ils sont témoins compétents, l'un contre l'autre, en faveur de la Couronne, ou l'un pour l'autre, contre la Couronne.

3° Que cette compétence a lieu même lorsqu'un verdict a été rendu contre le complice appelé comme témoin, pourvu que la sentence n'ait pas été prononcée sur le verdict.

4° Que, dans ce cas, la crédibilité du témoin est entièrement laissée à l'appréciation du jury.

5° Qu'en matière de parjure, il ne peut pas y avoir de complices et que l'accusé seul peut être tenu responsable du parjure dont on se plaint.

Le 6 octobre 1869, Cyrille Tellier et William-Hector Pelletier subirent leur procès devant la Cour du Banc de la Reine, juridiction criminelle, à Montréal, DRUMMOND, J., sur une accusation rapportée contre eux, pour parjure. Il s'agissait d'une poursuite privée. Cyrille Tellier fut appelé le premier à la barre. Durant le cours de ce procès, deux questions de droit furent soulevées par la défense, et réservées, par le juge présidant, à la considération de la Cour du Banc de la Reine siégeant en appel. Il fut d'abord fait une objection à l'acte d'accusation. La poursuite prétendait qu'un parjure avait été fait par Tellier aux sessions spéciales de la paix, sous la présidence du juge des sessions, Charles Coursol. L'acte d'accusation se lisait comme suit: "At the special sessions of the Peace, holden "in and for the district of Montreal, in the province of Que-"bec, on the 18th day of august, 1869, before Charles Coursol, "*Judge of the General Sessions of the Peace in and for the* "*said district, etc.*" La défense prétendit qu'il y avait un défaut dans cet acte d'accusation, et que ce défaut devait lui être fatal. Qu'au lieu et place des mots cités plus haut, on aurait dû insérer les suivants: "Charles Coursol, Judge of the session of the Peace in and for the city of Montreal." La poursuite demanda à amender l'acte d'accusation, en vertu de la section 78 du chapitre 99, Statuts refondus du Canada. La défense s'y

objecta, disant qu'il s'agissait ici de faire un amendement à un allégué qui était essentiel à la cause. Qu'il s'agissait d'une poursuite pour parjure, et qu'il était essentiel que les qualités du juge ou magistrat, devant lequel il était allégué que le serment avait été prêté, fussent correctement énoncées et décrites dans l'acte d'accusation. L'hon. juge DRUMMOND permit à la poursuite de faire l'amendement demandé, mais réserva la question pour la considération de ses collègues, à la réquisition de la défense. La Cour d'Appel a unanimement renvoyé cette objection comme non-fondée. Voici maintenant la seconde question, qui fut décidée complètement en faveur de la défense par cette dernière cour. Cyrille Tellier demanda à faire entendre, comme témoin favorable à sa cause, William-Hector Pelletier. La poursuite s'objecta à l'examen de ce témoin, sur le principe qu'il était accusé de parjure, conjointement avec le prisonnier, et que, pour cette raison, il était incompétent. La cour déclara l'objection bien fondée. Sur demande de la défense la question fut réservée pour la Cour d'Appel. Cyrille Tellier fut trouvé coupable. On procéda ensuite à faire le procès de William-Hector Pelletier. La même objection fut faite à l'acte d'accusation, et réservée ainsi que dans la première cause. Pelletier demanda que Cyrille Tellier fût entendu comme témoin. La poursuite s'y objecta, sur le principe qu'il était le complice du prisonnier, qu'il a été trouvé coupable de parjure, et qu'il ne pouvait pas être entendu comme témoin. L'objection fut maintenue, et la question réservée. En Cour d'Appel Charles Ouimet prétendit qu'un complice, qui n'était pas accusé dans le même acte d'accusation avec le prisonnier, pouvait être entendu comme témoin; que, sous ces circonstances, un complice pouvait être témoin de la défense, tout aussi bien que témoin de la couronne; que c'était au jury seul, et non au juge, de décider du degré de crédibilité qui doit être accordée au témoignage d'un complice; que, si le complice a un intérêt dans l'issue du procès, cette objection peut se faire à sa crédibilité, mais non à sa compétence; que, dans la présente cause, il s'agissait de parjure, qu'il ne pouvait pas y avoir de complice dans une cause pour parjure; que les défendeurs n'auraient pas pu être accusés dans le même acte d'accusation; qu'il s'agissait de deux défendeurs se défendant chacun sur une accusation séparée; que l'intérêt que l'un pouvait avoir dans l'acquittement de l'autre ne suffisait pas pour le rendre incompétent à rendre témoignage; attendu que sa crédibilité restait à être appréciée par le jury; que ce n'était pas le verdict qui disqualifiait, mais bien la sentence. Et que, même un homme qui avait plaidé coupable à un crime comportant l'infamie pouvait être entendu comme témoin, si la sentence n'avait pas encore été prononcée contre lui. A l'appui de ce que dessus, les

autorités suivantes furent citées : Russell, on Crimes, vol. 3, dernière édition : " *What interest disqualifies* : An accomplice is a competent witness for his associates as well as against them, even when they are severally indicted for the same offence, whether he is convicted or not," page 610. " A prisoner who has pleaded guilty but is not sentenced is a competent witness for another prisoner," pages 620, 627. La cause de *Regina* vs *Fellowes*, Carrington et K., vol. 1, page 115 ; Archbold's, *Pleadings and Evidence*, 19e edition, page 303 : " A defendant who has pleaded guilty is an admissible witness, even before sentence, for or against his co-defendants." Starkie's *Law of Evidence*, vol. 2, page 12 ; Roscoe's *Criminal Evidence*, Edition de 1884, pp. 130 et 131 ; Hale, Pleas of the Crown, vol. 1, page 305, Balmore's case ; Greenleaf, *on Evidence*, vol. 1, pages 425 et 426, n°s 379, 380 : " The degree of credit which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the jury." Greenleaf, vol. 1, page 434, n° 389. Powell's *Law of Evidence*, pages 37 et 41 ; Hale, P. C., vol. 2, page 280 ; Carrington and Marshman's Reports, page 111, *Regina* vs *George and Ford* ; Dennison's Crown cases, page 84 ; Phillips, *on Evidence*, vol. 1, 3e édition, page 28 : " Practice as to admitting accomplices. If an accomplice is himself separately indicted for the same offence, this will not affect his competency before conviction ; and even "after conviction he is " not incompetent, unless judg- " ment has been passed upon him, for it is not the conviction " but the judgment that creates, the disability." Page 30 : " As " the infamy of an accomplice's character does not render him " an incompetent witness for the prosecution, it follows, upon " the same principle, that he will be also a competent witness " on behalf of the prisoner." Woolrich, vol. 1, pp. 181 et 182 ; Taylor, *on Evidence*, vol. 1, page 632 et s.

Ces prétentions furent maintenues par la Cour du Banc de la Reine, siègeant en appel, et les verdicts dans les deux causes furent en conséquence mis de côté. La cour confirma le principe qu'un complice pouvait avant la sentence être témoin pour ou contre son co-associé ; que l'intérêt qu'il pouvait avoir dans sa cause pouvait affecter sa crédibilité, mais non le rendre incompétent, et que le jury seul pouvait décider de la crédibilité du témoin. La cour considéra que, dans les deux causes, les deux accusés devaient être regardés comme deux défendeurs, se défendant séparément, attendu qu'ils n'avaient pas été accusés dans le même acte d'accusation ; qu'il ne peut pas y avoir de complice dans une accusation de parjure, et qu'il n'y avait rien contre eux qui pouvait les rendre incompétents à servir comme témoin l'un pour l'autre.

DUVAL, C. J. : The allowing of the amendment was clearly

correct, but we all think, after mature consideration, that the ruling with regard to the evidence was wrong. The prisoners were not indicted jointly, and the offence charged, being perjury, was not and could not be joint. The trial is, therefore, set aside and a new trial ordered. (1 *R. L.*, p. 565; 3 *R. L.*, p. 124, et 15 *J.*, p. 146)

J.-A. CHAPLEAU, pour la poursuite.

CHS OUIMET, pour les accusés.

W.-H. KERR, Conseil.

CESSION DE BIENS.—BOIS DE LA COURONNE.

COUR SUPÉRIEURE, Joliette, 21 juin 1866.

Coram LORANGER, J.

PIERRE RIVARD *vs* CHARLES-E. BELLE.

Jugé : 1° Qu'une cession, faite aux termes du droit commun, par un débiteur à ses créanciers, sans décharge de leur part, ne dépouille pas le débiteur de ses droits de propriété ; que les créanciers ne sont que des administrateurs ou *procuratores in rem domini*, avec droit de disposer des biens cédés, dans leur intérêt commun et celui de leur débiteur, auquel appartiennent les actions intentées contre les tiers à raison du détournement de ces biens.

2° Qu'une saisie faite sans écrit, des bois de la Couronne, par ses agents, et pratiquée contre les possesseurs de ces bois sans titre légal, n'a aucune valeur, et est frappée de nullité absolue.

3° Que, tant que les droits n'ont pas été payés sur ces bois, la Couronne en conserve la possession civile, et peut les saisir en quelques mains qu'ils passent, nulle aliénation valable n'en pouvant avoir lieu au préjudice du fisc.

PER CURIAM : Le demandeur réclame du défendeur, en sa qualité d'agent des bois de la Couronne pour le territoire de l'Ottawa Inférieur, $5,818.62 ; $3,818.62 étant la valeur de 94 plançons (bois carré) de pin mesurant 10,706 pieds cubes, 35 billots de même bois de première qualité, égaux à 36¾ toises, 45 billots de même bois de seconde qualité, égaux à 40½ toises, 3,043 billots d'épinette blanche, égaux à 1,532¼ toises, et 854 morceaux de cèdre, de différentes longueur et grosseur, et mesurant 21,977 pieds, que le demandeur, propriétaire du bois, reproche au défendeur d'avoir vendu et fait vendre, le 20 novembre 1862, en sa qualité officielle, au village de l'Industrie, maintenant la ville de Joliette, sans autorité et sans cause, et sans avoir rempli les formalités voulues par la loi, pour valider cette vente, et la revêtir du sceau de la légalité, la balance, savoir $2,000, étant pour dommages et intérêts. Nous verrons plus tard quelles sont les informalités dont se

plaint le demandeur. Le défendeur a, en premier lieu, plaidé une exception péremptoire, par laquelle il invoque une cession de biens, faite le 4 novembre précédant la vente, par le demandeur à ses créanciers, dans laquelle se trouvait le bois dont il est question en la demande. Une seconde exception allègue que les bois en question avaient été coupés sans autorité, sur les terres de la Couronne, du clergé, des écoles, et sur les autres terres publiques du Bas-Canada. Le 25 mars 1862, Léon Grenier donna, devant Alexandre Daly, agent des Terres de la Couronne pour les cantons de Rawdon, Chertsey, Kilkenny et autres lieux du Bas-Canada, information, sous serment, que 530 morceaux de bois carré, de pin, avaient été coupés sur les lots de profondeur de Rawdon, et sur le rang de front de Chertsey, 143 morceaux ayant été coupés sur des terres privées, et 347 sur les terres de la Couronne, et que ce bois était dans la rivière *Lac Ouaro* et sur ses bords. Le 9 septembre 1862, Daly saisit ce bois dans la rivière *Lac Ouaro* et la rivière l'Assomption, ainsi que d'autre bois avec lequel il était mêlé, vu l'impossibilité de discerner le bois coupé sans autorité, des autres bois avec lesquels il était confondu. Le 10 septembre 1862, cette saisie fut signifiée au Département des Terres de la Couronne, et avis personnel en fut donné au demandeur, par l'agent Daly. Le demandeur n'a pas donné à Daly, ni à d'autre officier du département, dans le temps requis, avis de son intention de réclamer le bois saisi, qui devint confisqué. Le 11 novembre 1862, le Département des Terres de la Couronne (Section des bois et forêts) ordonna la vente du bois saisi. Le 20 octobre, avis verbaux et écrits furent donnés et lus, publiés et affichés aux portes des églises de Saint-Charles-Borromée et de Rawdon, par le défendeur, annonçant qu'une vente publique aurait lieu au magasin du demandeur, au village de l'Industrie, le 20 novembre prochain, d'une quantité d'environ 1,200 plançons de pruche et de pin, d'un lot de cèdre d'environ 600 morceaux, et d'autres bois y mentionnés. Le 20 novembre, jour fixé, le bois saisi comme ayant été coupé sans autorité sur les terres publiques, et le bois avec lequel il était mêlé, furent vendus avec les formes ordinaires aux ventes de ce genre, et Charles-Edward Scallon en devint l'adjudicataire, ledit bois étant des quantités et qualités détaillées en un état assermenté par l'adjudicataire. Avant la saisie et la vente, le demandeur fut à diverses reprises, requis par l'agent Daly de payer les droits que la Couronne pouvait exiger sur ces bois, ce qu'il a refusé de faire. Pierre-P. Martin, l'un des créanciers et cessionnaires du demandeur, et qui agissait pour la masse, refusa également, le jour de la vente, de payer les droits exigibles par la Couronne sur le bois saisi, et déclara qu'il en faisait abandon. Une

troisième exception répétait textuellement les allégations de la seconde avec ce seul ajouté : "Le 21 avril 1862, un autre affidavit fut, devant le même Daly, donné par John Nulty, déposant, qu'une quantité de 1,400 toises de billots d'épinette, et de plus de 620 morceaux de cèdre, avaient été coupés sur la moitié nord-ouest du lot n° 12 du 11ème rang du canton de Rawdon, et qu'il avait vendu ce bois à James Payton." Après cette allégation, le défendeur prétend que Nulty n'avait point payé le prix de vente de la moitié nord-est de ce lot n° 12, et que les droits exigibles par la Couronne sur le bois coupé jusqu'au jour de la saisie n'avaient pas été payés, bien que demande de paiement eût été faite, tant à James Payton qu'au demandeur, avant et après la saisie qui fut pratiquée de ce bois mentionné en l'affidavit de Nulty, le 9 septembre, en même temps que celui indiqué par l'affidavit de Grenier, et ils furent vendus ensemble, le 20 novembre, et adjugés à Charles-Edward Scallon, l'ordre de vente ayant été émané par le Département des Terres de la Couronne ; le défaut de réclamation du demandeur, le défaut de Martin de payer les droits, et son abandon du bois s'appliquaient également aux deux quantités de bois, c'est-à-dire au bois saisi pour avoir été coupé sans autorité sur les terres publiques, et à celui coupé sur un lot non payé à la Couronne, qui n'avait point reçu ses droits sur telle coupe, c'est-à-dire encore, au bois de pin, formant un lot particulier, et au bois de pruche et de cèdre faisant un autre lot distinct du premier, distinction que nous observerons. Une défense générale par laquelle le défendeur nie les allégations du demandeur, et ajoute " que le bois vendu par le défendeur, en sa qualité d'agent des bois de la Couronne, pour le territoire de l'Ottawa Inférieur, ni aucune partie d'icelui, n'avait été réclamé dans les délais prescrits par la loi, par le demandeur, malgré qu'une saisie dudit bois, et autres avec lequel il était alors mêlé, eût été dûment faite par Alexander Daly, agent des Terres de la Couronne, le ou vers le 9 septembre 1862, sur informations ou affidavits assermentés, et qu'avis personnel de ladite vente eût été donné par Daly au demandeur, et qu'ainsi, lors de la vente par le défendeur, ès-qualité, le 20 novembre 1862, ledit bois était condamné déjà depuis longtemps. A la première exception, le demandeur répond que la cession qu'il a faite à ses créanciers ne l'a jamais dépouillé de la propriété de ses biens, et, notamment, le droit d'action qu'il exerce ; que ses créanciers, nommés dans la cession, ne l'ont jamais déchargé de ses dettes, et que les syndics y dénommés n'ont été que des *séquestres* ou mandataires chargés d'effectuer la vente de ses biens, et d'en distribuer le prix à ses créanciers. A la seconde, il nie les faits qu'elle articule, et ajoute : que, si aucun des bois mentionnés en sa décla-

ration ont été coupés sur des terres publiques, ce qu'il n'admet pas, mais nie formellement, ils l'ont été avec permission et non en voie de fait. Il résulte de la preuve, que, le 19 octobre 1861, par acte authentique reçu devant Désaulnier, notaire, James Payton s'engagea envers le demandeur, à faire couper et scier cinq cents billots de bois d'épinette blanche, que Payton devait couper et scier durant le cours de l'hiver alors prochain, dans le canton de Rawdon, et faire descendre le printemps suivant, par la rivière Lac-Ouaro, jusqu'à un endrroit appelé le *Boom* de Bénoni Perreault, en la paroisse de Saint-Paul, et moyennant le prix convenu pour la coupe et le sciage, les droits du gouvernement sur le bois qui devait être marqué des initiales du demandeur, devaient être soldés par Payton. Dans l'hiver de 1861 et 1862, Payton fit pour le demandeur 497 morceaux de bois carré de pin, dont 450 morceaux furent descendus à Québec, le printemps suivant, par le demandeur, qui n'a point payé les droits du gouvernement sur ce bois, et le restant, c'est-à-dire environ 47 morceaux, restèrent dans la rivière Lac-Ouaro. Dans le même printemps, 1862, Payton délivra aussi au demandeur 3043 billots d'épinette sciés, 35 morceaux ou billots de pin sciés, et 45 autres, de seconde qualité, également, 854 morceaux de cèdre. Tout ce bois fut délivré sur la glace et étampé au nom du demandeur; moins celui envoyé à Québec. Tout le bois ainsi fait par le demandeur resta dans la rivière, pendant la saison d'été de 1862. Le demandeur était le fournisseur de Payton. Les 497 morceaux de pin [bois carré ou plançons], avaient été coupés sur des terres de la Couronne, dans les cantons de Rawdon et Chertsey, et les billots d'épinette, de pin, et les morceaux de cèdre furent coupés sur les lots numéros 12, 13 et 14 du onzième rang du canton de Rawdon, en possession des nommés Nulty, Thomas Rothan et Thomas Costello. Nulty, Rothan et Costello avaient des billets de location de leurs lots, et les derniers n'avaient rien payé en acompte. Nulty avait une permission de couper du bois. L'on sait que les billets de location ne comportent aucun droit de propriété et n'emportent pas la permission de couper du bois. Une des conditions de semblable licence de couper du bois, comporte qu'elle est donnée sujette aux règlements du département des Terres de la Couronne, et un règlement en date du 18 janvier 1861, produit par P.-M. Partridge, témoin du défendeur, surintendant des bois et forêts [règlement que le demandeur a cependant soutenu être sans preuve, comme nous le verrons plus tard], comporte que le prix du bois coupé, en outre de la licence, sera approprié au paiement du prix d'achat du lot auquel elle s'applique. Dans la présente espèce, Payton n'a jamais rien payé, pour aucune quantité de bois coupé, ni pour celui coupé sur les

terres de Nulty, Rothan et Costello, ni les autres terres de la Couronne, soit sous forme de droits, soit sous forme de prix du bois acheté de Nulty qui avait le droit de le vendre, en vertu de sa licence. Le demandeur, informé de ce fait, a souvent promis de payer, mais n'a jamais mis sa promesse à exécution. Le 25 mars 1862, Léon Grenier donna, devant l'agent Daly, l'affidavit dont il a été question ci-haut, et, le 21 avril 1862, John Nulty fit, sous serment, un rapport, devant le même Daly, qu'il avait vendu à James Payton, sur la partie Nord-Ouest du lot n° 12, dans le 11ème rang de Rawdon, 1400 toises de billots d'épinette, et 620 billots de cèdre, aux prix y portés. Le 9 septembre, ou vers ce temps, Daly, en sa qualité d'agent, saisit [à cette partie de la preuve orale, il y a eu objection de la part du demandeur, et de cette objection il sera question en son lieu] une partie du bois, dont il est assez difficile de connaître la qualité et quantité, vu qu'il n'y a pas eu de saisie faite par écrit. Les seuls indices qui peuvent nous donner quelques renseignements sont : 1° Une lettre écrite par Daly au défendeur, en date du 10 septembre, dans laquelle il parle de bois saisi sur le demandeur, ainsi que sur d'autres personnes. 2° Un état donné par Charles-E. Scallon, qui, lors de la vente faite le 20 novembre 1866, se porta adjudicataire, et 3° Un écrit du 20 octobre, étant une vente faite par le défendeur audit Scallon et au nommé Pelletier. Je citerai un extrait de ces trois écrits quand il s'agira de constater plus particulièrement les quantité et qualité du bois saisi et vendu. Le 10 septembre, Daly fit au demandeur un rapport de ses procédés et de la saisie ; après avoir, le 9, adressé au demandeur une lettre le notifiant que tous les billots d'épinette, et tout le bois de cèdre qui se trouvaient sur la rivière Lac-Ouaro étaient sous saisie, au nom de la Reine, par le défaut de paiement des droits, et qu'ils seraient vendus suivant le cours de la loi. Un avis public, en date du 20 octobre, est produit par le défendeur, et signé par lui par lequel il informe le public que le 20 novembre prochain, une vente publique aura lieu au magasin du demandeur, qu'une quantité de billots d'épinette et de pin, contenant environ 1200 morceaux, un lot de cèdre, environ 600, et un lot de pruche seront vendus comme ayant été coupés en voie de fait sur les terres publiques. Le 11 novembre, Andrew Russell, assistant commissaire des Terres de la Couronne, écrivit de Québec une lettre au défendeur, par laquelle il lui disait, en réponse à la sienne du 26 septembre dernier, transmettant une autre lettre de Daly, du 10 du même mois [la lettre ci-haut citée], relativement à une certaine quantité de pin et d'épinette et de perches de cèdre saisis, qu'il eût à procéder à la vente du bois coupé sans autorité sur les lots vacants de la Couronne ; et que, par rapport aux

bois coupés en vertu de licences, il pouvait en accepter la valeur convenue entre les parties, ou leur plus basse valeur réelle [ne pouvant être moins que les droits] et les frais de saisie, si les intéressés voulaient les payer, sinon qu'il procédât également à la vente. Le 20 novembre 1862, le bois fut vendu par le défendeur, dans l'hôtel du demandeur tenu sous le même toit que son magasin, dont il était séparé par un passage intérieur, le défendeur ayant offert au demandeur et à un de ses syndics de discontinuer la vente, si les droits étaient payés, et Charles-E. Scallon en devint adjudicataire, avec pouvoir de se mettre en possession du bois et d'en faire un rapport détaillé. Le 23 juillet 1863, Scallon fit sous serment un rapport au défendeur de la quantité de bois qu'il avait achetée, et qui s'était trouvée dans la rivière Lac-Ouaro, dans le canton de Rawdon et la paroisse de Saint-Paul, 2,292 billots d'épinette, 453 morceaux de cèdre, 37 morceaux de bois carré, faisant en tout, £96.11s.9d., pour prix d'achat. Le demandeur a produit la vente faite par le défendeur à Charles Scallon, adjudicataire pour la plus grande partie du bois, et au nommé Pelletier pour une très faible partie qu'il a même laissée à Scallon, ainsi qu'il le dit dans sa déposition, et cette vente est datée du 20 octobre 1862, ce qui est probablement une erreur cléricale, octobre ayant été inséré pour novembre, puisque ce fut le 20 novembre que la vente eut lieu. Tels sont les faits qui ressortent de l'enquête, dont quelques-uns ne sont pas trop clairement établis. Il serait cependant inutile de s'occuper des faits, si l'exception préliminaire du défendeur est bien fondée, et, si, par sa cession de biens, le demandeur s'est dépouillé de l'exercice de la présente action. Pour savoir si le demandeur a renoncé à l'exercice de la présente demande, en faisant cession de biens à ses créanciers, il faut rechercher les effets d'un acte semblable. La cession de biens, sans décharge donnée au débiteur, contient-elle une aliénation ou un simple mandat de les administrer et de les vendre au profit du cédant qui, jusqu'à concurrence de ce qu'ils rapportent, est libéré vis-à-vis les cessionnaires ? Si la cession renferme aliénation du domaine de la chose cédée, ce doit être à titre de vente ou de dation en paiement. Une vente suppose un prix, et une dation en paiement la libération du débiteur. Or la cession n'a aucun de ses caractères. Le cédant n'est, par le fait seul de la cession, en rien déchargé de son obligation, et son créancier ne lui donne pour toute considération que la promesse de ne pas exercer de contraintes contre lui. S'il reçoit, il acquittera le débiteur, et si la cession est infructueuse, il conservera l'intégrité de ses créances. Son immixtion n'est donc que celle de mandataire qui, dans son intérêt propre, (et en cela il diffère du mandataire ordinaire) gère l'affaire d'autrui.

C'est le *procurator in rem domini*, qui gère pour son propre compte, sans cependant que ce pouvoir d'administration et de disposition soit emprunté au droit de propriété. Je conçois que l'action du demandeur soit exercée au profit de ses créanciers, et que, sous certaines circonstances, ils puissent en contester l'exercice; mais je ne puis me rendre à la proposition que le défendeur, un tiers, puisse invoquer ce moyen, sur le silence des intéressés. En le faisant, il excipe clairement des droits d'autrui. Le projet du Code de Procédure civile a consacré ces principes par deux articles: Art. 778: "La cession ou abandon de biens ne dépouille le débiteur que de la jouissance de ses biens, et ne donne aux créanciers que le droit de faire vendre en justice, pour se payer de leurs créances respectives." Art. 779: "La cession ou abandon de biens ne libère le débiteur que jusqu'à concurrence de ce que les créanciers ont touché sur le produit de la vente de ces biens." La première exception est donc mal fondée. Avant d'apprécier les autres moyens des parties, sur la manière dont les exigences du Statut "concernant la vente et l'administration des bois sur les terres publiques" ont été observées, savoir le chap. 23 des S. R. C., il faut d'abord en faire l'analyse, pour en bien saisir les dispositions. Les premières clauses du Statut ont rapport aux permis de coupe de bois que le Département des Terres de la Couronne a le droit de donner sur les terres non concédées, à la manière dont ces permis sont donnés, à leur étendue et aux droits de la Couronne sur les bois coupés en vertu de ces permis pour assurer le paiement. Cette partie du Statut pourvoit à la création du revenu territorial de la Province, en facilitant l'exploitation des bois qui croissent sur les terres publiques, et n'a aucun rapport à l'objet qui nous occupe. La clause septième, qui me paraît être d'une grande importance sur le point en litige, pourvoit à ce que celui qui coupe ou fait couper du bois sans autorisation sur les terres publiques n'acquière aucun droit sur ce bois, et perd ses frais et ses avances: et, si ce bois est soustrait au contrôle des officiers du Département, et à leur saisie, celui qui a fait ou fait faire le bois, outre la perte de ses frais et avances, est passible d'une pénalité de $2.00 pour chaque arbre, et, sur la poursuite pénale, l'obligation de prouver qu'il a obtenu une permission retombe sur lui. Indépendamment de la pénalité à laquelle est soumis celui qui coupe, ou fait couper, du bois sur les terres publiques, sans permission, et de l'ouverture qu'il donne à la saisie, en vertu de la clause suivante: la septième clause me paraît déclarer, en thèse absolue, que, dans nulles circonstances, celui qui coupe, ou fait couper, du bois ne peut acquérir aucun droit, assimilant son acte au vol qui ne confère aucun droit de possession. La section huitième pourvoit à ce que, sur information

sous serment que du bois a été coupé sans autorisation sur les terres publiques, le département puisse faire saisir ce bois, au nom de Sa Majesté, et le mettre sous garde, jusqu'à ce qu'il intervienne une décision sur le sujet, de la part d'une autorité compétente. La clause 9ème permet à celui qui saisit de réclamer l'assistance de la force publique, et quiconque, sous quelque prétexte que ce soit, entrave par violence l'exécution de la saisie, est coupable de félonie; et la clause dixième qualifie de vol l'enlèvement du bois saisi, quel que soit le titre qu'invoque celui qui l'enlève, avant la décision d'une autorité compétente. Le paragraphe 2 de cette clause 10 porte que, dans les cas de saisie ou de poursuite pour pénalité, ou pour jugement de confiscation, et qu'il s'agira de constater si les droits imposés sur le bois en litige ont été payés, ou s'il a été coupé ailleurs que dans les terres publiques, la preuve de paiement, ou la preuve de la terre sur laquelle le bois aura été coupé, retombera sur le propriétaire dudit bois, ou sur la personne qui le réclamera, et non sur l'officier qui l'aura saisi ou arrêté, ou sur la partie qui aura contracté telle action. La clause 11 décrète que tous les bois saisis seront condamnés, s'ils ne sont réclamés dans un mois de la saisie; et, à défaut de tel avis, l'officier saisissant fera rapport des circonstances de l'affaire au commissaire des terres de la Couronne, qui pourra ordonner la vente des bois, après avis donné sur les lieux au moins trente jours d'avance. Et tout juge, ayant juridiction compétente, peut prendre connaissance de la matière, etc. Le reste de cette section, et les suivantes, n'ont pas d'application au présent litige. Le défendeur fonde sa défense sur le statut et prétend que le bois, dont le demandeur réclame la valeur, a été coupé sans autorisation sur les terres publiques; que, sur information sous serment, il l'a fait saisir; que le demandeur ne l'a pas réclamé dans un mois de la saisie; que, sur rapport fait au département de la couronne, ordre a été donné de procéder à la vente, après avis suffisant, et que cette vente a eu lieu sous l'autorité du statut dont il invoque les indemnités. Le demandeur repousse ces prétentions, d'abord par un moyen de fait. Il prétend qu'il n'y a point de preuve que le bois en question avait été coupé sur les terres publiques. Elucidons d'abord ce moyen, pour aborder ensuite les informalités dont il impugne la saisie et tous les procédés qui l'ont précédée et suivie. Voyons ce que révèle la preuve, au sujet du site sur lequel a été coupé le bois. Il est certain que les billots de pin et d'épinette, et le cèdre, ont été coupés sur les lots 12, 13 et 14 dans le cinquième rang de Rawdon, étant les lots possédés par Nulty, Rothan et Costello. Restent les plançons de pin. Edward Cahill, le mesureur du demandeur, dit qu'ils ont tous été coupés sur les terres de la Couronne. Payton ne parle que de 300

morceaux comme ayant été coupés sur des terres dans les cantons de Rawdon et Chertsey. Grenier, le même qui a donné l'affidavit ci-haut, et qui était l'homme de confiance de Payton, dit que 183 plançons ont été coupés sur des terres privées, et le reste, 387, sur les terres de la Couronne. Admettant qu'une partie de ces plançons n'a pas été coupée sur des terres de la Couronne, mais sur les terres des particuliers, peut-on dire qu'il y a légitimement lieu à la supposition que ceux qui étaient restés dans la rivière Lac-Ouaro, quand la saisie a été faite, sont de ce nombre, et que la Couronne n'y avait aucun droit. S'il s'agissait d'une cause ordinaire à laquelle l'intérêt du revenu public n'attacherait aucune faveur, le point pourrait souffrir quelque difficulté ; mais il me paraît que le cas actuel entre dans la catégorie de ceux prévus par le paragraphe second de la clause dix qui met à la charge du demandeur la preuve du lieu où le bois a été coupé ; et l'absence de cette preuve de sa part donne lieu à la présomption que le bois a été coupé sur les terres publiques. Prenons donc pour admis que tout le bois réclamé par le demandeur a été coupé sur les terres publiques de la Couronne. Voyons si le défendeur s'en est emparé légalement en sa capacité d'agent des bois de la Couronne, et s'il en a disposé de la manière voulue par la loi ; ce qui nous conduit à l'examen de la saisie, et à juger de la validité et de l'efficacité de la vente. Le premier vice que le demandeur reproche à la saisie est de n'avoir pas été faite par écrit. Une saisie verbale de ce genre est nulle, pour deux raisons, dit le demandeur. 1° Parce qu'elle n'est pas susceptible de preuve, la preuve orale ne pourrait en faire foi ; en second lieu, parce que c'est un acte public, et que l'écriture seule peut lui donner l'existence. Le second motif me paraît porter sa démonstration à sa face, et n'avoir pas besoin de commentaire. Une saisie, quelle qu'elle soit, faisant passer la chose séquestrée du domaine privé sous celui de la puissance publique, et en enlevant la possession à celui qui est réputé le maître, un instrument public doit lui donner un caractère authentique, pour la faire entrer dans la classe des actes publics. C'est l'acte de l'officier public qui, pour se justifier, doit toujours être à même de rapporter la preuve de son mandat. Cette preuve peut-elle consister en une autre chose qu'un écrit ? C'est aussi le procédé préliminaire à l'expropriation, c'est-à-dire à la résolution du droit de propriété en la personne du saisi, et au transport forcé que la vente publique en fait à l'adjudicataire. Une saisie doit avoir une date certaine, et les écrits seuls ont des dates. Les actes manuels n'en ont pas, du moins, ils n'offrent pas de mode rationnel de les constater. La défense a voulu éluder cette nécessité d'un écrit, par la différence des saisies en matière civile, et de celles faites sous l'au-

torité des lois fiscales. Il est bien vrai que les formalités voulues par les ordonnances civiles ne s'appliquent pas aux saisies fiscales, mais il ne peut être question que des formes extérieures, et non des formes intrinsèques, habilitantes des saisies et qui sont de leur essence. De ce que la saisie faite, disons pour fraude des droits de douane, diffère, dans sa nature et ses effets, de la saisie civile, peut-on dire que, dans le premier cas, plus que dans le dernier, l'officier qui la fait est dispensé d'en rapporter la preuve? Peu importe que, dans un cas, la fin de la saisie soit la vente précédée de confiscation, que, dans le premier, elle suive le jugement et le précède dans le second, l'effet immédiat de la saisie n'est-il pas le même? La prise de possession de la chose privée par l'autorité publique. Et c'est cette intervention de la force publique qu'un écrit seul peut constater. Je ne connais pas de saisie faite verbalement en ce pays. Les saisies de la douane se font par écrit, et peu importe que le statut l'ordonne ou reste muet. L'on a dit que la saisie de faux poids et mesures se fait sans écrit. Je n'ai pu vérifier ce fait. L'on pourrait peut-être ajouter que la saisie des comestibles vendus en fraude des règlements de police se fait aussi sans écrit. Mais, dans ces deux cas, il s'agit d'une simple confiscation contre laquelle la loi ne donne aucun recours au propriétaire qui en est l'objet. D'ailleurs l'abus dans un cas ne saurait le justifier dans un autre. Ici, à la raison d'ordre public, deux motifs tirés de la loi viennent se joindre pour exiger la preuve d'un écrit. Le statut qui nous occupe dit que la saisie du bois se fera au nom de Sa Majesté, et que, si le propriétaire ne le réclame dans un mois de la saisie, il sera condamné. Comment faire au nom de Sa Majesté une saisie non constatée par un écrit, et lui assigner une date certaine? Outre la nécessité abstraite d'un écrit, les lois qui régissent la preuve en font une exigence, puisque semblable fait ne peut être l'objet de la preuve testimoniale. Or, comment donner l'effet d'une saisie à un acte dont on ne peut rapporter de preuve légale devant les tribunaux? Je n'hésite donc pas à proclamer comme bien fondée la proposition du demandeur, et à dire qu'un écrit est nécessaire pour constater régulièrement la saisie faite de bois coupé sur les terres publiques en vertu de la clause 8 du chap. 23 des S. R. C. L'on a voulu faire regarder comme équivalent de la saisie la lettre écrite par l'agent Daly au défendeur, et l'avis donné au demandeur l'informant de la saisie. Je ne puis me rendre à cette assimilation. Si un écrit pour valider la saisie est nécessaire, quelle qu'en soit la forme, sur laquelle je ne me prononce pas, tous les avis donnés au saisi et aux officiers du revenu ne peuvent suppléer à l'acte lui-même qui, n'ayant pas eu de validité le jour même qu'il a été fait, ne peut la recevoir d'écrits faits après

coup. Il est beaucoup d'autres informalités dont se plaint le demandeur, pour démontrer que le défendeur n'a pas suivi les directions que lui donnait le statut. La clause 11 du statut dit qu'à défaut de réclamation dans un mois de la saisie, le commissaire des terres pourra ordonner à l'agent de vendre le bois après avis donné sur les lieux au moins trente jours d'avance. Ici cet avis de trente jours qui me paraît être de rigueur n'a pas été donné, puisque l'ordre de vendre n'a été émané par l'assistant-commissaire des Terres de la Couronne que le 11 novembre, et que la vente a eu lieu le 30. Les avis donnés avant cet ordre n'ont pu évidemment être l'avis des trente jours voulu après l'ordre de vente, et les délais écoulés avant cet ordre n'ont pu entrer dans la computation des trente jours. Le bois vendu a consisté en billots d'épinette, en morceaux de cèdre, et en plançons de pin, et l'affidavit de Grenier qui est le seul donné, au désir de la clause huitième, ne parle que des plançons de pin. Daly, dans sa lettre au défendeur, sur laquelle l'ordre de vente fut donné par l'assistant-commissaire, ne mentionne pas non plus de plançons de pin comme ayant été saisis, et il y a des variantes entre tous les documents, les lettres de Daly, celle de l'assistant-commissaire, et l'avis de vente, quant à la quantité et la qualité du bois. Je ne dis point que ces variantes puissent seules affecter la validité des procédés, mais, jointes aux nullités de la saisie et de l'avis de vente, il me paraît qu'en raison de l'incohérence des formalités de la loi, le défendeur ne peut invoquer la saisie qui a été faite, et les procédés qui l'ont précédée et suivie, comme sa justification de la vente, et qu'il est responsable, vis-à-vis le demandeur, des bois qu'il a vendus, si de son côté le demandeur en était le propriétaire ou y avait des droits. Jusqu'ici nous avons examiné la justification du défendeur. Nous avons trouvé qu'il ne pouvait pas invoquer le bénéfice du statut, parce qu'il n'avait pas observé les formalités nécessaires pour revêtir ses procédés du sceau de la légalité. Il faut maintenant examiner le titre du demandeur, et savoir s'il a fait preuve d'un droit de propriété ou de possession du bois vendu, suffisant pour lui donner le droit d'en réclamer la valeur. Car, c'est à celui qui fait une demande à justifier qu'elle est bien fondée, et, quelque répréhensible que puisse être l'acte du défendeur, il n'est responsable, vis-à-vis du demandeur, qu'en autant que cet acte a porté préjudice à ses droits. Le défendeur fût-il en défaut, que le demandeur devait encore faire preuve de son droit pour obtenir ses conclusions, et, dans une cause contestée, le rejet des exceptions ne peut clairement justifier le maintien de l'action, si le demandeur n'en fait preuve. Il incombait donc au demandeur d'établir son droit de propriété sur le bois saisi, et voyons comment

il en a justifié. En matière ordinaire, et sous l'empire du droit commun, je n'hésiterais pas à dire, qu'en vertu de la maxime qui veut qu'en fait de meubles "*possession vaille titre,*" le demandeur ayant prouvé la sienne, il aurait par là établi son droit de propriété. Mais ici le litige est soumis à l'opération d'un statut, le chapitre 23 des S. R. du Canada, dont la clause 7ième ci-haut citée, décrète que "quiconque, sans autorisation, coupe, ou emploie ou engage d'autres personne ou personnes à couper, ou aider à couper des bois sur les terres de la Couronne, du clergé, des écoles, ou sur les autres terres publiques, n'acquerra aucun droit sur les bois ainsi coupés," et, outre la perte de ses travaux et de ses avances, sera soumis à une pénalité, si le bois a été soustrait aux saisies du Revenu public. Où le bois saisi sur le demandeur a-t-il été coupé ? Sur les terres publiques et sans autorisation, puisque le bois qui n'a pas été coupé par voie de fait, l'a été en vertu de la licence donnée à Nulty, et que cette licence ne rend légitime l'exploitation du bois qu'à la condition expresse que la valeur du bois coupé sera payée à l'agent des terres de la Couronne, ce qui n'a pas été fait. Qui a coupé le bois, et qui l'a fait couper ? James Payton l'a coupé, et c'est le demandeur qui le lui a fait couper, moyennant rémunération, il est vrai, mais avec pleine connaissance que les bois coupés devaient être sur les terres publiques, puisque, dans le marché du 19 octobre 1861, il est stipulé que Payton paiera les droits du gouvernement. Le demandeur connaissait donc que, si Payton ne payait pas les droits, il serait obligé de le faire lui-même, et que, si ni l'un ni l'autre ne les payait, ce bois serait considéré comme du bois coupé sur les terres publiques sans autorisation. Il me paraît que c'est pour des cas analogues que la clause sus-citée a été introduite dans le statut, et pour protéger le revenu contre des empiètements semblables à celui-ci. Aux termes de ce statut, le demandeur n'a donc acquis aucun droit sur les bois qu'il a ainsi fait couper, et doit être débouté de sa demande. Ce jugement, impérieusement dicté par la stricte légalité, n'est pas, dans les circonstances de cette cause, moins fondé dans ses considérations équitables. (1 *R. L.*, p. 571)

GODIN, pour le demandeur.

OLIVIER et BABY, pour le défendeur.

COMPAGNIE COMMERCIALE.—PRESCRIPTION.

COUR DU BANC DE LA REINE EN APPEL,

Montréal, 8 mars 1870.

Présents: CARON, DRUMMOND, BADGLEY, MONK, JJ.

THE CONNECTICUT AND PASSUMPSIC RIVERS RAILROAD COMPANY, appelante, *et* CHARLES COMSTOCK, intimé.

Jugé: 1° Que les souscriptions au *fonds social* d'une corporation publique, comme une compagnie de chemin de fer, ne sont pas prescriptibles par six ans à compter de l'échéance de chaque appel de fonds; la prescription sexennale ne s'appliquant qu'aux contrats d'une nature commerciale, et l'engagement de payer des parts souscrites n'étant pas d'une nature commerciale.

2° Qu'une corporation étrangère incorporée et reconnue par les lois d'un pays étranger où elle tient le siège de ses opérations, peut valablement contracter dans cette Province, y ester en justice, et contraindre ceux qui ont contracté avec elle d'exécuter leurs engagements, tout comme une personne naturelle qui résiderait dans un pays étranger.

3° Qu'un actionnaire ne peut refuser de payer le montant de sa mise, par le fait que la corporation aurait commis des actes illégaux et de nature à déprécier la valeur des actions; de tels griefs peuvent donner lieu à des actions en dommages contre la corporation, ou les directeurs individuellement, mais ne peuvent opérer la résolution du contrat d'association.

4° Que, dans l'espèce, le contrat d'association a été rédigé par écrit et que la demanderesse ne peut être tenue à l'accomplissement d'aucune autre condition que celles mentionnées audit contrat.

L'appelante, compagnie américaine et propriétaire du chemin de fer des rivières Connecticut et Passumpsic, ayant son *terminus* nord à Saint-Johnsbury, dans le Vermont, cédant aux sollicitations des habitants de la partie nord du Vermont, dans les Etats-Unis, et de ceux du comté de Stanstead et des environs, en Canada, sur les confins du Vermont, résolut, en 1854, de prolonger le chemin en question jusqu'aux confins du Canada, afin d'opérer une jonction avec le chemin projeté de Stanstead, Shefford et Chambly. Il fallait $1,200,000 pour opérer cette extension. La compagnie, par l'entremise de ses agents, offrit d'exécuter l'entreprise, et de prélever elle-même $900,000, à la condition que la balance requise, $300,000, lui serait fournie en parts souscrites par les habitants résidant dans les environs du chemin projeté. Après plusieurs assemblées de ces derniers, une liste de souscriptions, aux fins de prélever la somme de $300,000, fut ouverte, portant en tête le contrat d'association, rédigé dans les termes suivants: " Whereas the Connecticut and Passumpsic Rivers railroad Company " propose to extend said railroad from Saint-Johnsbury to the " town of Derby, if means can be obtained for that object;

" now, for the purpose of extending said railroad, we, the sub-
" scribers, agree to associate ourselves with said company, and,
" hereby, promise to pay to the company the sum of one
" hundred dollars, on each share, to be expended by the
" directors in the extension and construction of said road *from*
" *Saint-Johnsbury to Derby Line*, provided that the under-
" signed shall not be obliged to pay any part of this subscrip-
" tion till the whole part of the road between the last named
" *points* shall be put under contract for grading, and that sixty
" days' notice shall be given by the treasurer of directors of
" said company to us for each instalment, and sixty days
" between each call of ten per cent." Le montant requis fut souscrit, et l'intimé signa conditionnellement la liste pour deux parts, comme suit: " Charles Comstock. If I obtain my " money from the Saint-Lawrence; two shares." La liste remplie fut déposée par les actionnaires entre les mains de l'appelante. Les parts, comme on le voit par le contrat d'association, étaient payables par versements de dix par cent, à au moins soixante jours d'avis pour chaque appel de fonds, et après seulement que le contrat pour la construction du chemin aurait été donné par l'appelante. Une difficulté s'était élevée à propos du *terminus* nord du chemin. Plusieurs arpentages avaient eu lieu, fixant le *terminus* sur la ligne dite "Derby Line," ou à "Derby Line Village." Partie des intéressés désirait que le *terminus* fût fixé à "*Derby Line Village*," et partie à un autre endroit sur la ligne du Canada. Dans une assemblée publique tenue à Stanstead Plain, il fut décidé que la question du *terminus* serait une question ouverte afin de ne pas ralentir les souscriptions, en blessant les rivalités qui existaient entre les habitants des diverses localités. L'appelante, après le dépôt des listes de souscriptions, donna le contrat des travaux à un nommé Balch. La construction du chemin fut commencée en 1855. Le *terminus*, après bien des hésitations, a été fixé à "Walker Place," dans Stanstead, sur la ligne provinciale, à une distance d'environ quatre milles de "Derby Line Village." Dans le but de prélever la somme de $900,000 que la compagnie s'était obligée de fournir pour la confection du chemin, cette dernière créa un fonds privilégié (*preferential stock*) avec une garantie portant hypothèque sur le chemin, de six par cent par an, payable semi-annuellement pendant cinquante ans; ce fonds devant être offert d'abord aux actionnaires, et, sur leur refus, aux étrangers. Les travaux, ayant été mis en opération, la compagnie fit successivement, depuis le premier avril 1856 au premier mars 1858, des appels de fonds jusqu'au montant des parts souscrites qui furent ainsi complètement dues en mars 1858. L'intimé ayant refusé de payer le montant de ses parts souscrites,

fut, en 1862, poursuivi par l'appelante, devant la Cour de Circuit du district de Saint-François, présidée par l'honorable juge Short. Pour repousser cette action, l'intimé invoqua les moyens suivants: 1° que la demanderesse, par le contrat d'association, par sa conduite dans cette affaire, et par les déclarations publiques de ses agents, avait promis de mettre le *terminus* du chemin au "*Derby Line Village*," et qu'ayant manqué à son engagement sur ce point, en mettant le *terminus* à "*Walker Place*," les souscripteurs se trouvaient déchargés de leur obligation de lui payer leur mise; 2° que la compagnie avait agi de mauvaise foi, et brisé ses engagements envers les actionnaires, en créant un fonds privilégié, ce qui diminuait la valeur des actions, et qu'elle n'avait pas encore rempli les obligations, dont l'accomplissement seul lui donnait le droit de prélever le montant des actions; savoir qu'elle n'avait pas encore donné le contrat des travaux; 3° que la compagnie avait encouru la déchéance de ses droits, vis-à-vis des actionnaires, en se rendant coupable de préférences, et en faisant à quelques-uns des déductions sur leurs actions, tandis qu'elle exigeait le montant entier des autres actionnaires; 4° que l'action de la compagnie, pour les versements exigés, était prescrite par le laps de six ans écoulés depuis la souscription des actions; 5° que la compagnie, constituant une corporation étrangère, n'avait pas le droit de contracter dans ce pays; que, conséquemment, l'obligation de l'intimé était radicalement nulle. Sur la première question, celle du *terminus*, l'intimé prétendit que "*Derby Line*," mentionné dans le contrat d'association, voulait dire "Derby Line Village"; que c'était la seule interprétation possible à donner à cette expression; que c'était là le sens que les directeurs et les agents de la compagnie lui avaient donné par leurs déclarations et leur conduite; que toutes les circonstances qui ont précédé et suivi l'association le démontraient; que l'intimé n'avait souscrit qu'à la condition que le *terminus* serait à "Derby Line Village," et que la compagnie, ayant jugé à propos de le mettre à Walker-Place, à quatre milles de Derby Line Village, il se trouvait, par ce fait, relevé de son obligation de payer sa souscription. A l'appui de cette prétention, l'intimé cita les autorités suivantes: Quebec and Richmond R. R. vs Dawson (1). Con. Stat. C., chap. 66, sec. 10, sub-section 11: "No

(1) La sec. 33 du chap. 116 des Statuts du Canada de 1850, 13 et 14 Vict., intitulé: "Acte pour incorporer Peter Patterson, écuyer, et autres, sous le nom de *La compagnie du chemin de fer de Québec et Richmond*" contenait la disposition suivante: "*La première assemblée générale des propriétaires pour mettre le présent acte à effet, pourra se tenir, aussitôt que quinze cents actions de ladite entreprise auront été souscrites; et à telle assemblée générale, les propriétaires assemblés avec tels procureurs qui seront présents, choisiront treize personnes dont chacune sera propriétaire d'au moins dix actions dans ladite*

" deviation of more than one mile from the line " of the Rail-
" way or from the places assigned thereto in the said map
" or plans shall be made" &c. Redfield, on Railways (Edition of 1869), § 18, p. 65, vol 1: " In some cases it is a condition of
" the charter, or of the subscriptions to the stock, that the tract
" of the railway shall touch certain points, or that it shall not
" approach within certain distances of other lines of travel.
" This class of conditions, so far as they can practically be
" denominated conditions precedent, must be strictly complied
" with, before the company can properly go into operation
" so as to make calls." § 48, p. 160: " Oral evidence is inad-
" missible to vary the terms of a subscription to the stock of
" a railway, unless it tend to show fraud or mistake. But where
" the subscriber is really misled, and induced to subscribe for
" stock, upon the representation of a state of facts in regard
" to the time of completing the road, or its location, made by
" those who take up the subscription, and in good faith, and
" upon proper enquiry, and the exercise of reasonable discre-
" tion, believed by the subscriber, and which constitutes the
" prevailing motive and consideration for the subscription,
" and which proves false, it would seem that the contract of
" subscription should be held void, both in law and equity."
Angell & Ames, On corporations, § 537, p. 570: " Consequently
" the assessment sued for, if raised to advance objects essen-
" tially different, or the same objects in methods essentially
" different from those originally contemplated, are not made
" in conformity to the defendant's special contract with the
" corporation." § 538: " Where the directors of a turnpike
" corporation, with the assent of a corporation, procured an
" act of the legislature altering the course of the turnpike
" road, an individual, who, before such alteration, had suscrib-
" ed for a share, and had expressly promised to pay all assess-
" ments, was held not to be answerable in an action for the
" assessments. The court, in giving judgment, said: " The
" plaintiffs rely on an express contract, and they are bound

entreprise, pour être directeurs de ladite compagnie, en la manière ci-après réglée." La première assemblée générale des propriétaires ou actionnaires eut lieu, et les directeurs furent choisis avant que quinze cents actions furent souscrites. Il a été jugé que la compagnie n'était pas légalement organisée, et qu'un actionnaire poursuivi par la compagnie ainsi organisée pour le paiement des actions par lui souscrites n'était pas tenu de les payer, et qu'il pouvait, comme défense à cette poursuite, invoquer cette illégalité de l'organisation de la compagnie, et qu'il n'était pas tenu de procéder par *quo-warranto* ou par la procédure indiquée dans la sec. 8 du ch. 41 des Statuts du Canada de 1849, 12 Vict., intitulé: " Acte pour définir le mode des procédures à adopter dans les cours de justice du Bas-Canada dans les matières relatives à la protection et à la régie des droits de corporation dans les brefs de prérogative, et pour d'autres fins y mentionnées." (*La compagnie du chemin de fer de Québec et Richmond* vs *Dawson*, C. C., Québec, 30 juin 1851, DUVAL, J., 1 D. T. B. C., p. 366, et 3 R. J. R. Q., p. 40)

" to prove it as they allege it. Here, the proof is of an " engagement to pay assessments for making a turnkipe in a " certain specified direction, and of the making of a turnpike " in a different direction. The defendant may truly say : *Non " haec in foedera veni.* He was not bound by the application of " the directors to the legislature for the alteration of the course " of the road, nor by the consent of the corporation thereto. " Much fraud might be put in practice under a contrary deci- " sion." § 539 : " So the change of one of the *termini* of a " plank road by authority of the legislature, releases previous " subscribers." § 540 (note) : " The subscription of stock, " like other contracts, ought to receive such a construction as " to carry into effect the probable intention of the parties. " But parol evidence is not admissible to show what that " intention was, if it varies the written terms of the subscrip- " tion." En réponse à cette prétention, l'appelante a prétendu que la question du *terminus* a été laissée ouverte et sujette au choix des directeurs, à une assemblée publique des actionnaires ; que ce fait a été ensuite expliqué à l'intimé, et que ce dernier a pris des parts et souscrit la liste après telle explication ; que la fixation du *terminus* à " *Derby Line Village* " n'a jamais été une des conditions du contrat, dans lequel l'intimé a eu le soin de stipuler certaines conditions spéciales, qui ont été remplies par l'appelante ; enfin, que " Derby Line " veut dire dans l'interprétation ordinaire, la ligne nord du canton, ce qui laissait une certaine latitude qui n'a pas été franchie par la fixation du *terminus* à " *Walker Place*, située sur la ligne nord de la ville de Derby ; que c'était à l'intimé à démontrer que ces expressions ne devaient pas être interprétées dans le sens ordinaire. A l'appui de cette dernière prétention, l'appelante a cité les autorités suivantes : 2 Starkie, on evidence, 362 : " Where the meaning of terms is plain and " unequivocal it seems to be a universal rule that no evidence " can be admitted of a custom or usage to receive such terms " in a different sense," 2 Phillips, on Evidence, with Crown & Hill's notes, p. 632 : " Words of a clear meaning if used in contracts in a non natural sense, must be gathered from the contract." Sur la seconde question, l'intimé prétendit que la compagnie avait agi de mauvaise foi et brisé ses engagements, en créant un fonds privilégié qui dépréciait la valeur des actions souscrites, et qu'elle n'avait pas encore accompli une condition sans laquelle elle ne pouvait pas prélever de versements : celle de donner le contrat pour la construction complète du chemin ; que les directeurs s'étaient servi du nom d'un nommé Balch pour donner l'entreprise des travaux, mais que ce contrat était simulé, que Balch n'était qu'un prête-nom, et que c'étaient les directeurs qui, de fait, s'étaient consenti à eux-mêmes le

contrat. A cette prétention, l'appelante a répondu qu'elle ne s'était pas engagée à prélever les $900,000 sur les mêmes bases que les $300,000 ; que, dans le contrat d'association, il n'y avait aucune condition de stipulée quant à cela, et que l'appelante n'avait rien fait pour affecter les intérêts des actionnaires ; que ce fonds privilégié, du reste, avait été offert en premier lieu aux actionnaires. Sur la troisième question, l'intimé a prétendu que la corporation, s'étant rendue coupable de préférence en faveur de certains souscripteurs et ayant accepté des règlements inégaux de souscriptions, avait par là encouru la déchéance de ses droits contre les autres souscripteurs. A l'appui de cette proposition, il cita les autorités suivantes : Angell & Ames, *On Corporations*, § 531, p. 563 : " And " if a stock company lets off a part of its subscribers, and re- " turns them their money, other subscribers, not consenting " thereto are discharged from all liability growing out of their " original subscription." *Mann* vs *Cooke*, Am. R. R. cases (Smith & Bates) Vol. 2, p. 125 : " Held that a corporation created for public purposes could not receive a subscription under private arrangement at less than the par value of the stock, as this would take from the company so much of its available means, and would thus operate as a fraud upon creditors and other stockholders. *Mid. College* vs *Loomis*, Vermont Reports, Vol. 1, pp. 208, 211 ; *Mid. College* vs *Williamson*, Vermont Reports, Vol. 1, pp. 225, 228 ; Shelford, *on R. R.*, 1, p. 204 ; Redfield, *on R. R.*, sec. 58. A cette objection, l'appelante a répondu qu'elle s'était engagée à prolonger son chemin de Saint-Johnsbury à Derby Line, pourvu qu'on lui déposât une liste de souscriptions valable pour $300,000 ; qu'elle n'avait pris aucune part dans les démarches nécessaires pour faire souscrire cette liste, qui avait été signée à la réquisition d'intéressés au chemin ; que les collections inégales qui avaient pu être faites, l'avaient été par des personnes non autorisées par elle, et qu'elle n'avait jamais prétendu abandonner son droit de faire payer les arrérages qui pouvaient lui être dus. Sur la quatrième question, celle de la prescription, l'intimé a prétendu que l'action de l'appelante était prescrite en vertu du statut refondu du Bas-Canada, chapitre 67 ; que toutes les autorités s'accordent à dire que des appels de fonds, comme ceux dont il s'agit, tombent sous le coup de la prescription établie pour les matières commerciales, et se prescrivent par le laps de six ans. Il cita entr'autres Angell and Ames, *On Corporations*, § 517, p. 549 qui dit : " With the view of facilitating the forma- " tion of [joint stock] companies, it is usual to have the capi- " tal sub-scribed for, payable in instalments, or in small sums " payable from time to time ; and an engagement so to pay at " stipulated periods, is one which causes the statute of limita-

" tion to attach to each instalment as it becomes due." Sec. 542, p. 575 : " In late cases in Pensylvania, it is held that, if no " call is made for subscription to stock in arailroad company, " until more than six years from the time of the subscription, " the law will presume that the company meant to abandon " the enterprise, and will not enforce the subscription." Dans le cas actuel, a ajouté l'intimé, la souscription, dont il s'agit, a été faite depuis près de dix ans, et huit ans se sont écoulés, depuis la répartition et les appels de fonds, jusqu'à la présente action. A cela l'appelante a répondu que seulement deux appels de fonds, de dix par cent chaque, étaient dus depuis plus de six ans avant l'institution de l'action ; que l'acte de prendre des parts dans une compagnie de chemin de fer n'était pas un contrat d'une nature commerciale ; qu'une compagnie de chemin de fer peut être une corporation commerciale comme *voiturier*, mais ce sont les opérations qu'elle fait comme *voiturier* qui la constituent corporation commerciale ; que l'acte par lequel une personne s'associe à telle corporation n'est pas un acte commercial ; qu'il n'y a dans ce fait aucun des caractères de la spéculation ; que l'acte de l'intimé d'avoir souscrit deux parts ne pouvait pas le rendre et le faire considérer comme commerçant ; qu'un nombre quelconque de semblables souscriptions ne pourraient le faire considérer comme commerçant de manière à le rendre sujet aux provisions de faillite. *Vide* Abbott's notes on insolvent act of 1844, pp. 4, 7 et 8 *Cork and Beaudon Railway Coy* vs *Goode*, 13 Common Bench Reports, 828 ; Addison, *On Contracts*, p. 1202 ; 1 Shelford, *On Railways*, p. 1803, note 1 ; que, conséquemment, notre statut de prescription, concernant les matières commerciales, n'a pas d'application pour le cas actuel. Enfin, sur la cinquième question, concernant les pouvoirs des corporations étrangères de contracter dans ce pays, et de contraindre en justice ceux qui ont pris des engagements envers elles à les exécuter, l'intimé a prétendu que les corporations n'ont de pouvoirs et de droits que ceux qui leur sont conférés par l'action législative qui leur concède leur charte ; qu'elles ne peuvent, en conséquence, avoir des droits, par induction ou autrement, au-delà des limites de la juridiction qui les incorpore ; que les corporations n'ont pas eu le droit de poursuivre dans ce pays, les obligations valablement contractées envers elles ailleurs, tant que ce droit ne leur a pas été concédé par un acte de notre Législature Provinciale ; que la nécessité de cette autorisation législative démontre la nature restreinte des droits des corporations, et que les termes du statut font pleinement voir qu'il n'était pas dans les intentions du législateur d'accorder aux corporations étrangères le droit de contracter dans ce pays. A l'appui de ces prétentions, l'intimé a cité les autorités suivantes : Stat.

Ref. du Bas-Canada, chap. 91, sect. 2; Angell and Ames, *On Corporations*, §§ 104, 161; Redfield, *On Railroad*, sec. 17. A cette cinquième et dernière objection, l'appelante a répondu en citant des autorités qui tendent à affirmer le principe, qu'une corporation reconnue et incorporée par la loi du lieu où elle a le siège principal de ses opérations, peut valablement contracter et ester en justice en pays étranger. Nous croyons, dans l'intérêt de la question, devoir citer textuellement la partie sur ce point du factum produit par les avocats de l'appelante. " Since the decision, in England, in the case of the *Dutch W. I. Co.* vs *Henriques Van Moyes*, there has never been question of the right of a foreign corporation to sue in England. This implies a right to *contract*. It was recently held that an action of assumpsit could be maintained by a foreign corporation under its corporate name. *Bank of St. Charles* vs *Bernales*, 1 C. and P., 559. *Vide* Chitty, *On Contracts*, Am. Ed. of 1842, p. 278. In various cases, have foreign corporations been treated as foreign individuals having the power to do what, through the ministry of agents, a foreign person can do. They are treated as foreigners in requiring security for costs. The *Kilkenny Railway* vs *Freeden*, 2 Law and Eq. Rep., 388; *Limerick and Waterforest Railway Co.* vs *Fraser*, 4, Bingham, 394; *Edinborough and Leith Railway Co.* vs *Dawson*, 3 Jurist, 55. As to corporations being treated as natural persons, as respects residence, *vide Am. Railway Cases*, pp. 142, 3: Held that a Scotch corporation became amenable to the English Courts, by coming into that country and establishing an agency and place of business, *McLaren* vs *Stanton*, 16 Eng. Law and Esq. Rep., 500. Power of foreign corporations to contract by agents, in England, is recognized in case *The Carron Ins. Co.* vs *McLaren*, 35 Law and Eq. Rep., 37. In *Fraser et al.* vs *Wilcox*, Peterson's Rep. S. C. Louisiana, this question is fully discussed. The following is an extract from the remarks of the learned Judge in that case: " We proceed to inquire whether by the comity of nations, foreign corporations have power to make contracts within their jurisdiction, and we can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the State or injurious to its interests. It is nothing more than the admission of the existence of an artificial person, created by the law of another State and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another State. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts, since the case of the *Dutch W. I. Co.* vs *Henriques*, decided in

1779, and it is a matter of history, which the court is bound to notice, that corporations, in this country, have been in the open practice, for many years past, of making contracts in England of various kinds, and to very large amount, and we have never seen a doubt suggested there of the validity of these contracts by any court or any jurist. It is impossible to imagine that any court in the United States would refuse to execute a contract by which an American Corporation had borrowed money in England, yet if the contracts of corporations made out of the State, by which they were created, are void, even contracts of that description could not be enforced." See also *Larocque* vs *Franklin Co. Bank*, 8 L. C. Rep., p. 328, et 15 R. J. R. Q., p. 164 (1). Con. Stat. L. Ca., ch. 91, secs 2

(1) Le ch. 21 des Statuts du Canada de 1850, 13 et 14 Vict., intitulé: "Acte pour établir le libre commerce de banque en cette province, et pour d'autres fins relatives aux banques et aux affaires de banques," décrétait sec. 5: "Qu'aucune banque incorporée ou ayant son principal bureau, ou le siège de ses affaires, dans un pays en dehors des possessions de Sa Majesté, n'ouvrira, ni ne tiendra un bureau ou lieu d'escompte ou dépôt, ou pour l'émission, mise en circulation ou rachat de ses billets dans cette province, à peine d'une amende de cent louis pour chaque jour où ce bureau ou lieu sera ouvert ou tenu ouvert, et cette amende sera recouvrée et appliquée de la même manière que les amendes imposées par la section précédente." Le ch. 198 des Statuts du Canada de 1853, 16 Vict., intitulé: "Acte pour faciliter l'admission comme preuve de jugements étrangers et de certains affidavits et autres documents, et pour améliorer autrement la loi de la preuve dans le Bas-Canada," décrétait: "**6.** Lorsque le sceau de tout état étranger, et le certificat du secrétaire ou d'un des secrétaires de tout tel état ou du gouvernement exécutif d'icelui, sera offert dans une cour de justice dans le Bas-Canada pour établir l'existence et la compétence d'une cour, d'une corporation, de membres du clergé, d'un prêtre ou ministre, d'un office ou officier, son identité relativement à tout document public ou à toute autre matière sera considérée comme authentique sans preuve d'icelle, et sera prise et reçue comme preuve *prima facie* du fait qu'on a l'intention d'établir par icelui, que cet état soit une souveraineté séparée, ou un des Etats-Unis d'Amérique ou de toute autre confédération ou union de plusieurs états. **7.** Pourvu toujours et qu'il soit statué, qu'il sera loisible à toute partie à une poursuite ou procédure de nier la vérité d'aucune desdites expéditions, vérifications, certificats ou extraits, et de ce faire par écrit avant la clôture de l'enquête de la part de la partie qui les produira, en quel cas la preuve du contenu de telles expéditions, vérifications, certificats ou extraits en la manière maintenant prescrite par la loi, sera à la charge de telle partie; mais si lesdites expéditions, vérifications, certificats ou extraits, sont prouvés être corrects et vrais au moyen d'une commission rogatoire ou autrement, les frais de telle preuve à être taxés par le juge, seront, à la discrétion de la cour ou juge devant lequel telle poursuite ou procédure aura lieu, payés par la partie qui aura nié comme susdit, quel que soit le jugement final dans la cause; et pourvu de plus, que lorsque la vérité d'aucune desdites expéditions, vérifications, certificats ou extraits sera niée comme susdit, il sera donné caution pour les frais de l'exécution de la commission pour la prouver à la satisfaction de la cour ou du juge par la partie qui en niera la vérité, et dans le délai et pour tel montant que ladite cour ou juge prescrira." Ces deux sections 6 et 7 comportent, dans leurs termes, une reconnaissance du droit qu'a une corporation étrangère d'être admise à poursuivre comme telle. Elles supposent le cas d'une poursuite intentée au nom d'une corporation étrangère et dans laquelle on produit un document, attesté en la forme voulue, comme preuve de son existence. La sec. 6 décrète, d'un côté, que ce document fera preuve, *prima facie*, tandis que, de l'autre

and 3; Grant, *On Corporations*, pp. 50 and 200. Angell and Ames, secs 377 and 378. Story, *Conflict of Laws*, sec. 565."

Le juge SHORT a rendu jugement pour l'appelante, lui donnant gain de cause sur tous les points soulevés. Voici le texte du jugement:

"The court, considering, firstly, that plaintiffs have proved all the material allegations in their declaration; secondly, that the contract or agreement set forth in plaintiffs' declaration was a good and valid contract or agreement, and not contrary to public policy, and one which plaintiffs could and might legally enter into with defendant, as any other of Her Majesty's subjects; thirdly, that defendant was not induced to enter into such contract or agreement by reason of any misrepresentation on the part of plaintiffs; fourthly, that plaintiffs' action in this behalf is not by any law or statute in force in Lower Canada, barred and prescribed as to the whole or any part of the money strictly claimed by reason of the lapse of more than six years between the accruing of the debt, and the commencement of the action; said limitation and prescription being inapplicable to such debts and actions, and, lastly, that, by the said contract or agreement, plaintiffs were not bound to terminate the road in question in this cause at the village of Derby Line, as pretended by defendant, but were at liberty to select as its terminus any convenient place on the boundary line between the town of Derby, in Vermont, and this province, doth, for these reasons, dismiss the exception of defendant and condemn him to pay to plaintiffs two hundred dollars, with interest thereon from the twelfth of August, 1862, until paid, and costs of suit."

Ce jugement a été cassé par la Cour de Revision qui a été d'une opinion contraire au juge Short sur la question du *terminus*. La Cour de Revision a trouvé que l'appelante s'était engagée à fixer le *terminus* nord du chemin projeté à "Derby Line Village," et que, l'ayant fixé à un autre endroit, situé à plus d'un mille de "Derby Line Village," l'intimé se trouvait

côté, la sec. 7 permet à la partie adverse d'en nier la vérité, "de ce faire par écrit avant la clôture de l'enquête de la part de la partie qui le produira, etc." C'est là reconnaître formellement le droit d'une corporation étrangère de poursuivre devant nos tribunaux. La prohibition portée contre les banques étrangères par la sec. 5 du ch. 21 des Statuts du Canada de 1850, ne peut pas être interprétée comme entraînant avec elle la négation du droit de poursuivre en ce pays; elle ne fait aucune allusion au droit d'une banque étrangère de poursuivre; elle n'ôte ni ne donne ce droit, et, si ce droit existait auparavant, elle le laisse donc subsister. Le statut de 1853 prouve que ce droit pré-existait, puisqu'il ne fait les règlements qu'il comporte à cet égard qu'en admettant nécessairement son existence. (*Larocque et al.* et *Banque du comté de Franklin*, C. B. R. en appel, Montréal, 1er juin 1858, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J., et CARON, J., confirmant le jugement de C. S., Montréal, 30 septembre 1857, 8 D. T. B. C., p. 328)

relevé de son obligation de verser les parts souscrites. Ci-suit le texte du jugement de la Cour de Revision :

"The court, considering that the condition of defendant's subscription for stock in plaintiffs' corporation or company has not been performed by plaintiffs, and, particularly, that plaintiffs have not carried their railroad to terminate at Derby Line, to wit Derby Line Village, where it was, between plaintiffs and defendant, understood that it should terminate, and where it was incumbent upon plaintiffs to make it terminate, and to which point plaintiffs were bound to carry their said railroad, if intending to enforce, against defendant, his said subscription for stock in plaintiffs' company; considering that plaintiffs have, in fact, made the terminus of their road in Walker Place, far away from Derby Line Village, and deny obligation to make it at Derby Line Village; considering that defendant has proved all that is necessary to support his case, particularly his third plea pleaded against plaintiffs' action; seeing that, by reason of said several premises in the judgment complained of, of the eighth of July, 1867, which hath condemned defendant to pay to plaintiffs, there is error, this court, revising said judgment, doth vacate and reverse the same, and proceeding to render the judgment that said Circuit Court ought to have rendered, doth maintain said third plea of defendant, and his last plea, and, in consequence, doth dismiss plaintiffs' action with costs as well in said Circuit Court as in this Court."

La cause ayant été portée en appel, la Cour du Banc de la Reine a unanimement infirmé le jugement de la Cour de Revision, et confirmé celui du juge SHORT. En prononçant le jugement, le juge CARON a observé que lui et ses collègues concouraient pleinement dans les motifs donnés par le juge SHORT à l'appui de son opinion, et rapportés au factum de l'appelante; et, qu'à une dissertation aussi lucide et aussi logique que celle de l'honorable juge qui a rendu le jugement de la Cour de Circuit du district de St-François, il n'y avait rien à ajouter. Nous croyons donc utile de reproduire textuellement les observations faites par le juge SHORT lors du prononcé de son jugement: "This is an action for recovery of subscription to stock of the Connecticut and Passumpsic Rivers Railroad Company. The defendant pleads: "1° Prescription, that more than six years have elapsed since the calls were made; 2° That plaintiffs have not complied with the agreement made by them, or rather the proposition made by the company, which led to the subscription of $300,000 in Northern Vermont and Canada, namely, that they would raise $900,000 if the people of Orleans county and Stanstead would raise $300,000, inasmuch as this $900,000 was raised by creating preference stock which

disparaged the value of the general stock; 3° That plaintiffs did not fulfil their part of the contract by putting the road under contract, and were not, by the terms of the written agreement, in a position to demand the subscription for stock until this was done; 4° That the road had not been built to Derby Line Village, as it was agreed that it should be, but had terminated at a point three miles therefrom; 5° That this is a contract which they had no right to make, being made out of their country. The fifth, although the last question raised, deserves to be the first disposed of, as it, if well founded, strikes at the root of the case. If plaintiffs could not make this contract with defendant, the whole thing is swept away and a discussion of other points is unnecessary. The authority cited by defendant's counsel from Angell and Ames, *On Corporations*, n° 104, is against, and not in favor of defendant's pretensions. "A corporation can have no legal existence out of the boundaries of the sovereignty, by which it is created. It exists only in contemplation of law, by force of law; and where that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognized by the state or nation where the dealing takes place; and that it is permitted by the laws of the place to exercise the power with which it is endowed (*Bank of Augusta* vs *Earle*, 13 Peters' Rep., pp. 588 et 589)." The power of a corporation to contract beyond the limits of the state or sovereignty where it is created was fully discussed in that case of the *Bank of Augusta* vs *Earle*. The Chief Justice of the Supreme Court, reversing judgment of the Circuit Court, cites the remarks which I have read from Angell and Ames, and says (13 Pet. Rep., p. 588): "It is indeed a mere artificial being, invisible and intangible; yet it is a person for certain purposes in contemplation of law, and has been recognized as such by the decisions of this Court." United States vs Amedy, and Beaton vs the Farmer's Bank of Delaware. Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside and where they are not personally present; and nobody has ever doubted the validity of such contract. What greater objection can there be to an artificial person, by its agents to make a contract within the scope of its limited powers in a

sovereignty, in which it does not reside ? In this case, a foreign corporation is treated as a foreign individual. Unless there is something in the local law preventing foreigners to contract, their contracts are valid by the universal comity of nations. Unless the contract made by this foreign corporation is against, or inconsistent with our law, it must be valid. The Connecticut and Passumpsic Rivers Railway Company could not enter into Canada and make a railway here, even if authorized by their charter, because it would be what is not permitted to our own subjects unless by special charter, and comity does not require us to extend to others rights denied our own citizens. But there is nothing to prevent residents here, contracting with the company as respects what comes within their legitimate powers and violates no law here. Besides, our own law, Con. Stat. Lower Ca., ch. 91, gives foreign corporations the right to sue and defend actions here and by implication recognizes their power to contract here. The multiplicity of mercantile corporations in modern times, and the use to which they are put, renders a liberal interpretation of their powers in this particular, of the very first importance. Were it held that all contracts with a corporation outside of the sovereignty where the corporation is created, are null; it would render inoperative all insurances in foreign corporations, all investments in foreign stocks, and remove one of the commonest facilities of modern commerce. I have no doubt of the power of defendants to contract, to take stock in plaintiffs' company and of their right to enforce payment of it. The next point to consider, is whether plaintiffs have done anything to forfeit their rights as respects defendant. It is objected that plaintiffs made preference stock, which diminished the value of the general stock. If this were true, it would, perhaps, afford an action to the holders of stock either against the company or the directors individually, for damages, but is not a reason why subscriptions to stock should not be paid. It might as well be said if directors purchased a horse for the company, that a subscriber need not pay his stock because an illegal act has been done. It is plain however, that this plea is unfounded. In fact, Cleveland gives very clear and conclusive evidence upon this point. Preference stock was issued upon which six per cent was guaranteed, but the moneys received belonging to the lower road was to be retained sufficient to meet this six per cent. Again, this preference stock was offered to the stock-holders. Defendant could have taken it. He shows no interest in urging this exception even supposing it founded in law. The 3rd objection is unfounded in fact. The next point urged and the one upon which a large amount of evidence has been adduced, is that

the road was not located to Derby Line (Village) where it is said it was contracted to be built. Derby Line, in its natural sense, means the boundary of the town, in this case the Northern boundary. Those who wish to give it a restrictive meaning, must show that there is reason for it. Much evidence has been given respecting the Stanstead meeting, at which a Mr. Cheney, one of the directors, was present. It is proved that a heading for a stock book was produced with "Derby Line Village," as a terminus, that Elisha Gustin objected to this, and after a discussion, the word village was struck out, leaving the terminus Derby Line. There must have been an object in Gustin in raising this discussion, and the striking out of the word 'village' must have had a purpose. Putting to one side all evidence as to the particulars of that discussion as remembered by different witnesses, differently as to details, from the whole, it is probable that Gustin made the objection in order to render the location of the railway terminus an open question, and striking out the word village can be understood as having no other meaning than a concession to Gustin's demand. Cheney was present and accepted this change publicly. It is true that it is proved that he said privately to one or two parties, that it would make no difference. Probably he supposed it would not. He supposed doubtless that it would go to or near Derby Line Village. There had been then only two surveys, and both had determinated in the vicinity of the village. There was evidently a good deal of rivalry about this matter. There was great rivalry between those on the East and those on the West parts of Stanstead, as to the terminus. Those on the East, of course, wanted it at Derby Line Village, but they wanted subscriptions, and the arguments, whether honest or dishonest, used to get the Western inhabitants to subscribe, were that the terminus was an open question, and that they would have as good a chance to get it as the Derby Line Village people. On the other hand, the arguments used in the Eastern section were, that it was sure and fixed that the terminus would be at Derby Line Village. These canvassers for stock were like boatmen who look one way and row the other. If, however, the company were to be made responsible for all that these irresponsible persons said, inspired with a railroad *furor*, they could not recover stock subscribed under such circumstances in any event. If the terminus had been at Derby Line Village, the subscriber might have said that it was contrary to the understanding when he subscribed, because he was told that it would surely come to Beebe's Plain. The defendant was not present at the Stanstead meeting. He was, however, present at the meeting subsequently at the Griffin's Corner, at which it is proved that the proceedings of

the Stanstead meeting were stated and it was stated that the location of the terminus was an open question and it might be any where from Holland to the lake. The defendant's interest appears to have been better served by the location of the road where it is, than it would have been, had it been located at Derby Line Village. When he subscribed, he stipulated a condition; it was that he would pay if his subscription to Saint-Lawrence and Atlantic Railroad Company were returned to him. If thus particular, why not, if there were other conditions, specify them. The only safe way and equitable way in this case, is to adhere to the contract. The contract, in its natural sense, admits of no doubt. The defendant, in attempting to put a restrictive sense to the words Derby Line, has elicited the evidence which shows that they were intentionally used in their natural sense. The other point raised by the pleading, is that plaintiffs' action is prescribed. The foreign law of prescription is not proved. By our own law, the sexennial prescription only applies to contracts of a mercantile nature. In my opinion, this is not a mercantile contract any more than the purchase of a piece of land. The objection falls to the ground. If it were valid, it could only apply to one or two calls, not to the whole, because six years did not elapse between the calls and action, so far as relates to all the calls but one or two. The points on the pleadings are thus disposed of. The defendant's counsel urges the fact proved that some subscribers had settled their stock at a less sum than its value as vitiating all the contracts for stock, and cites a case in Vermont in proof. In the case cited, it was an act of the company. Here individuals have settled with subscribers, at less than full payment of their stock, but there is no proof that the company sanctioned. There is nothing to prevent the company from collecting the subscriptions of those with whom such settlements have been made. These were arrangements between subscribers and individuals. The company's rights remain unchanged; but this point was not pleaded, and it is scarcely necessary to discuss it. Judgment for $200. Interest from the demand, and costs." (1 *R. L.*, p. 589)

SANBORN and BROOKS, pour l'appelante.

ROBERT N. HALL, pour l'intimé.

CORPORATIONS MUNICIPALES.—RESPONSABILITE.

COUR DU BANC DE LA REINE, EN APPEL,

Montréal, 8 mars 1870.

Coram CARON, DRUMMOND, BADGLEY, MONK, JJ.

THOMAS MATHEWS, appelant, *et* LE MAIRE, LES ECHEVINS ET LES CITOYENS DE LA CITÉ DE MONTRÉAL, intimés.

Jugé: 1° Que les corporations municipales sont tenues d'observer strictement les formalités prescrites par la loi et exorbitantes du droit commun, pour pouvoir exiger des contribuables le paiement de leurs cotisations, et, surtout, pour être en droit d'émaner une saisie-exécution aux fins de prélever ces cotisations.

2° Que les formalités qui consistent dans les avis publics et privés remplacent, pour les corporations municipales, les procédés judiciaires qu'il est nécessaire d'adopter pour avoir droit de faire saisir les biens d'un débiteur.

3° Que, sur une poursuite en dommages, par un contribuable contre la corporation, pour saisie illégale des biens de ce contribuable, c'est à la corporation à prouver que la saisie était légale, et autorisée par l'observation de toutes les formalités voulues par la loi, quand même le demandeur aurait allégué, dans sa déclaration, que la saisie pratiquée contre lui était illégale et malicieuse, sans se plaindre spécialement du défaut des formalités.

4° Que, dans l'espèce, des dommages sont accordés, bien que la corporation ait agi avec les précautions nécessaires pour ne pas molester l'appelant, et bien que ce dernier ait eu de graves torts envers la corporation; ces considérations ne devant servir qu'à mitiger les dommages.

L'appelant avait été cotisé, en mai 1866, pour une somme de $11.25, comme occupant un magasin, au n° 130, grande rue St-Jacques, à Montréal. Ayant laissé son magasin, rue St-Jacques, pour aller se fixer au n° 388, rue Notre-Dame, il fut de nouveau cotisé, en novembre 1866, pour une somme additionnelle de $18.75, vu que le changement de local avait augmenté la valeur de son capital, et son nom fut porté pour une somme de $30.00, au rôle supplémentaire des cotiseurs, en novembre de la même année. La première cotisation de $11.25 a été payée par l'appelant, en décembre 1866. Soit oubli, ou autre cause, la cotisation supplémentaire ne paraît pas lui avoit été demandée en même temps qu'il s'est présenté pour payer la cotisation de $11.25. En mars 1867, la cotisation de $30 portée au rôle supplémentaire paraissant encore due, un bref d'exécution a été émané par la corporation, pour en prélever le montant sur les biens de l'appelant, et ce bref a été confié à l'huissier Joubert. Ce dernier se rendit au magasin de l'appelant pour saisir. Un des commis lui dit alors que les cotisations pour l'année 1866 étaient payées, mais refusa de montrer le reçu, et menaça de poursuivre la corporation en dom-

mages, s'il y avait saisie. L'huissier s'en retourna sans procéder. S'étant assuré que la cotisation de $30 était encore due, il revint, peu de jours après, et opéra la saisie de quelques pièces de marchandises, qu'il a été sous l'obligation de mettre sous la garde d'un homme de police, parce que l'Appelant refusait de constituer un gardien, et qu'aucun des commis du magasin, sur l'instigation de l'appelant, ne voulait se charger de cette garde. Peu de jours après cette saisie, l'appelant a porté contre la corporation une action de dommages de $5,000. Dans sa déclaration, il alléguait qu'il avait payé toutes les cotisations qu'il pouvait légalement devoir pour l'année 1866, et bien qu'il eût ainsi payé tout ce qu'il pouvait devoir alors, la corporation avait, le 8 mars 1867, pratiqué sur ses biens une saisie *illégale* et *malicieuse*, aux fins de prélever les cotisations de 1866. Dans sa déclaration. il ne se plaignait pas du défaut des formalités requises pour donner droit à la corporation d'émaner un bref d'exécution : il alléguait simplement qu'il ne devait rien à la corporation pour les cotisations de 1866, et que la saisie, dont il se plaignait, était *illégale* et *malicieuse*. A cette action, la corporation a plaidé que la taxe originaire de $11.25 avait été payée, mais que la cotisation de l'appelant avait été augmentée par un rôle supplémentaire, et que cette augmentation de taxe, savoir $18.75, était encore due. La défense n'alléguait pas que les formalités exigées par la loi pour donner droit à la corporation de prélever cette cotisation, avaient été observées, elle énonçait simplement que la taxe réclamée avait été légalement et régulièrement imposée sur le commerce de l'appelant ; qu'elle était due, et que la corporation n'avait pas agi avec malice. L'enquête des deux parties a révélé toutes les circonstances qui ont accompagné et suivi la saisie en question, mais il n'a été nullement question des formalités qui doivent immédiatement précéder la saisie, c'est-à-dire des avis publics et privés, qui doivent être donnés avant la saisie. La corporation a simplement produit un extrait du rôle principal et du rôle supplémentaire de 1866, qui démontre que le nom de l'appelant y était porté, sur le premier, pour une somme de $11.25, et sur le second, pour une somme de $20. La cause ayant été arguée devant le juge MONDELET, la Cour Supérieure a jugé en faveur de la défense, et la Cour de Revision a maintenu unanimement ce jugement. L'appelant a interjeté appel à la Cour du Banc de la Reine, et, sur cet appel, DOHERTY, pour l'appelant, a prétendu : 1° qu'il avait payé toutes les cotisations qui étaient légalement exigibles lors de la saisie en question ; que, conséquemment, cette saisie était illégale, malicieuse et vexatoire ; 2° que la taxe de $30 réclamée par la corporation n'était pas due, en autant qu'il n'avait jamais été notifié de payer ce montant, en con-

formité de l'acte 27 et 28 Victoria, chapitre 60, secs 39, 40, 41 et 42, qui exigeaient des avis publics et privés, avant l'émanation d'un bref d'exécution ; 3° que la corporation ne pouvait exiger les cotisations, et que ces cotisations n'étaient dues qu'à la condition préalable que ces avis eussent été donnés ; 4° que, dans le cas actuel, la défense n'avait ni allégué, ni prouvé que les avis avaient été donnés ; que, conséquemment, elle n'avait pas démontré son droit d'émaner un bref d'exécution contre l'appelant, et que la saisie dont se plaignait ce dernier était légale et autorisée ; 5° enfin, que ce n'était pas à l'appelant à alléguer et prouver le défaut des formalités ci-dessus mentionnées ; qu'il lui suffisait d'alléguer que la saisie était illégale et malicieuse, et que, sur cet allégué, la corporation était tenue de prouver l'observation de toutes les formalités, afin de démontrer que la saisie avait été légale et pratiquée sans malice. Pour la défense, ROY et STUART prétendirent : 1° que l'appelant avait agi, vis-à-vis de la corporation, avec fourberie et malice, et cela, dans le but prémédité de se ménager une action de dommages ; 2° que les employés de la corporation, dans cette affaire, avaient eu tous les égards et pris toutes les précautions possibles pour éviter des désagréments à l'appelant ; qu'ils ne s'étaient vus forcés de saisir et de constituer une garde que parce que l'appelant avait tout fait pour les y forcer ; 3° que la taxe de $30, pour laquelle il y avait eu saisie, ou, du moins, la balance de $18.75, était bien et réellement due par l'appelant, ainsi qu'il apparaissait aux extraits des rôles de cotisation produits, ce que l'appelant connaissait parfaitement bien ; qu'en allant payer volontairement la première cotisation de $11.25, sans faire mention de la taxe supplémentaire, son dessein était de faire des difficultés à la corporation et de lui créer des embarras ; 4° que, quand à la question des avis, l'appelant ne s'en était jamais plaint ; qu'il n'alléguait pas dans sa déclaration le défaut de ces avis ; que, s'il se fût plaint de cela, il eût été bien facile à la défense de prouver que toutes les formalités exigées par la loi avaient été accomplies à la lettre ; que la contestation, telle qu'engagée par les pièces de plaidoirie, n'avait roulé que sur la question de savoir si l'appelant devait, ou ne devait pas de taxes pour l'année 1866, et que ce n'était qu'en appel que la question du défaut d'avis avait été soulevée.

La Cour d'Appel a infirmé les jugements de la Cour Supérieure et de la Cour de Revision, mais, comme l'appelant ne paraissait pas avoir agi avec bonne foi, il ne lui a été accordé que des dommages nominaux. Les honorables juges CARON, DRUMMOND et BADGLEY, ont remarqué, lors du prononcé du jugement, que l'appelant ne méritait pas de sympathie, parce qu'il était évident qu'il n'avait pas d'autre but que de faire de

la chicane, et que toute sa conduite, dans cette affaire, démontrait qu'il avait agi de manière à se donner le luxe d'une action de dommages ; que, néanmoins, il n'était pas permis aux corporations municipales d'adopter des procédés illégaux pour prélever les taxes, et de négliger une seule des formalités prescrites par la loi, pour leur permettre de recourir au droit exhorbitant de saisir les contribuables, sans sommation judiciaire, et sans jugement ; que, sur une poursuite comme celle-ci, c'était à la corporation à faire voir qu'elle s'était conformée à toutes les exigences de la loi, en accomplissant toutes les formalités qu'elle ordonne de suivre ; qu'il ne suffisait pas à la corporation de prouver qu'elle avait agi sans malice, et avec toutes les précautions nécessaires pour ne pas nuire ; que, dans les cas actuel, vu qu'il n'apparaissait pas qu'elle s'était conformée à la loi, la corporation devait être condamnée, malgré la conduite blâmable de l'appelant, qui, pour cela, ne pouvait prétendre qu'à des dommages nominaux. Voici le jugement :

" La cour, considérant que, lors de la saisie pratiquée par les intimés, et dont se plaint l'appelant, ce dernier était endetté envers les intimés en la somme de $18.75, étant la différence due par l'appelant, et la cotisation supplémentaire de $30, qui lui a été imposée, à cause du changement de local, dans l'intervalle qui s'est écoulé, entre la première et la seconde cotisation, pour l'année commencée le 1er mai 1866, et expirée le 1er mai 1867 ; considérant que, par l'acte 27-28 Victoria, chapitre 60, les intimés étaient autorisés à adopter des procédés sommaires, par bref de saisie-exécution, contre les contribuables en défaut de payer leurs cotisations, mais seulement après l'observation des formalités spécialement prescrites par ledit acte ; considérant que les intimés ont fait saisir illégalement, et ont illégalement gardé sous saisie, les marchandises et effets de l'appelant, sans l'observation préalable desdites formalités, pour le total de ladite somme de trente piastres, sur le refus formel de l'appelant de payer cette somme, ou aucune partie d'icelle, et en l'absence d'offres de ce dernier de payer ladite somme de $18.75 qu'il devait ; considérant que, dans le jugement rendu en première instance, par la Cour Supérieure, le 28 mars 1868, et dans celui de la Cour de Revision, en date du 21 novembre 1868, confirmant le premier, il y a erreur ; cette cour annule et casse lesdits jugements ; et, procédant à rendre tel jugement que la Cour Inférieure aurait dû rendre, condamne les intimés à payer à l'appelant, pour dommages au regard des prémisses, la somme de vingt piastres, avec intérêt de ce jour, et les frais d'une action de seconde classe en Cour Supérieure, ensemble avec les frais de la Cour de Revision, et ceux de cette cour. (1 *R. L.*, p. 610)

DOHERTY et DOHERTY, pour l'appelant.

STUART et ROY, pour les intimés.

DETENTEUR D'UNE TERRE HYPOTHEQUEE.

COUR DE CIRCUIT, Richelieu, 31 mai 1868.

Coram LORANGER, J.

CHARLES-L. ARMSTRONG *vs* ALEXIS BARRETTE.

Jugé: Que le détenteur d'une terre hypothéquée au paiement d'une créance, ne peut enlever les bâtisses érigées sur cette terre, et que, s'il le fait, quand même ce serait dans le but de mieux administrer ses biens, et non dans le but de frauder le créancier hypothécaire, ce dernier acontre lui un recours pour se faire payer une partie du prix non échue correspondant à la valeur des bâtisses enlevées.

Le demandeur vendit au défendeur une terre, pour le prix de $900, payable par terme, et pour sûreté de ce prix, il lui fut donné, dans l'acte de vente, une hypothèque de *bailleur de fonds* sur la terre vendue. L'acte de vente fut enregistré. Le défendeur, qui avait une propriété à une petite distance de celle acquise du demandeur, et sur laquelle il résidait, y transporta les bâtisses de la terre venant du demandeur. Son but était tout de bonne foi. La translation de ces bâtisses faisait mieux son affaire, et servait mieux ses intérêts. Le demandeur le poursuivit, pour réclamer de lui des dommages de $150, valeur des bâtisses enlevées, et prétendit que, par le fait du défendeur, la valeur de son hypothèque se trouvait diminuée, et qu'il souffrait jusqu'au montant de telle diminution. Il alléguait, de plus, que le défendeur avait enlevé ces bâtisses dans le but de le frauder et de le priver de son recours contre l'immeuble hypothéqué en sa faveur, mais cet allégué ne fut pas prouvé. Il a été prouvé, au contraire, que le défendeur avait agi de bonne foi; qu'il n'avait fait qu'améliorer sa position, et qu'il avait reconstruit les bâtisses sur la terre où il résidait, en leur faisant des améliorations d'une valeur considérable. Il ne restait plus que la question de savoir si, par le fait d'avoir diminué la valeur de l'hypothèque du demandeur, ce dernier avait un recours en dommages. Le demandeur prétendait que le fait en lui-même était une fraude à ses droits, tombant sous les dispositions de l'article 2054 du Code Civil, et lui donnant le droit de réclamer des dommages, en vertu de l'article 2055. Que ces dommages devant être accordés en déduction de la dette, les défendeurs ne pouvaient s'en plaindre. Le défendeur, de son côté, soutenait que le cas dont il s'agissait n'était pas un cas de fraude, dans le sens de l'article 2054; que, pour qu'il y eût fraude, il aurait fallu, de sa part, l'intention de diminuer ou d'esquiver son actif; que, loin de là, il n'avait enlevé les bâtisses de dessus une de ses propriétés que pour les recons-

truire, avec de grandes améliorations, sur une autre, et les rendre ainsi plus propres à ses besoins ; que l'hypothèque sur une terre ne dépouille pas le détenteur du droit de jouir et de disposer de sa terre en tout ou en partie : article 2053 du Code Civil ; que, pour qu'il y eût fraude, aux termes de l'article 2054, il aurait fallu qu'il y eût recel, mais que, dans le cas actuel, loin d'y avoir recel des biens du défendeur, il y avait, au contraire, une grande augmentation : que n'y ayant pas de fraude aux termes de l'article 2054, il n'y avait pas lieu à des dommages en faveur du demandeur, en vertu de l'article 2055, et que, si ce dernier avait un recours quelconque contre l'acte dont il se plaignait, c'était en vertu de l'article 1092, qui enlève au débiteur le bénéfice du terme stipulé en sa faveur, lorsqu'il a diminué les sûretés qu'il avait données par le contrat à son créancier ; mais que ce recours ne pouvait s'exercer par une action en dommages. L'action du demandeur fut maintenue par la Cour, qui a considéré que le dommage résultait du seul fait de la diminution des sûretés, à moins de circonstances exceptionnelles.

" La cour, considérant qu'en enlevant la propriété décrite en la déclaration, vendue par le demandeur au défendeur, et hypothéquée en faveur du premier pour la somme de $900, avec granges et autres bâtiments de la valeur de $150, le défendeur a diminué la sûreté créée par ladite hypothèque, d'une même somme de cent cinquante piastres, et qu'aux termes de l'article 1092 du Code Civil, il ne peut plus réclamer le bénéfice du terme à lui accordé pour le paiement du prix de vente jusqu'à concurrence de ladite somme, et que le demandeur est en droit de réclamer ladite somme de $150 en à-compte dudit prix de vente, bien que le défendeur ne puisse être contraint par corps à la payer, ne paraissant pas au tribunal qu'en enlevant ladite grange et bâtisses, il ait agi avec intention frauduleuse et qu'à cette somme de $150 il convient d'ajouter celle de $5, coût du protêt fait par le demandeur contre le défendeur, faisant des deux sommes celle de $155, condamne, etc." (1 *R. L.*, p. 645)

ARMSTRONG et GILL, pour le demandeur.

A. GERMAIN, pour le défendeur.

NULLITE DE DECRET.—OPPOSITION A FIN D'ANNULER.

COUR SUPÉRIEURE, EN REVISION, Montréal, 31 mai 1870.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

C.-L. ARMSTRONG, demandeur, *vs* ALEXIS BARRETTE, défendeur, *et* JOHN-GEORGE CREBASSA, opposant, *et* C.-L. ARMSTRONG, contestant.

Jugé: 1. Qu'un défendeur sur lequel un immeuble a été vendu par le shérif, ne peut, *de plano*, s'opposer à la saisie du même immeuble sur un tiers détenteur d'icelui, sans avoir, au préalable, fait annuler le décret dont il demande la nullité par son opposition, et ce, dans la cause où il a eu lieu.

2. Que le fait qu'un shérif se serait porté adjudicataire d'un immeuble par personnes interposées, ne rend pas le décret nul de plein droit, mais annulable.

Le demandeur fit émaner un bref d'exécution contre les immeubles du défendeur, et fit saisir, par le shérif du district de Richelieu, un campeau de terre situé en la ville de Sorel, comté de Richelieu, composé des lots numéros 458, 459, 460 462 et 463, contenant trois cents quatre-vingt-seize pieds de front, sur environ cent trente-deux pieds de profondeur, mesure anglaise, tenant en front à la rue Providential, en profondeur au terrain de l'église anglaise, d'un côté à la rue Albert, et d'autre côté à la rue Alfred, avec les bâtisses y érigées. Le 6 avril 1860, John-George Crébassa, notaire de Sorel, produisit, au bureau du shérif, une opposition à fin de distraire, dans laquelle il alléguait: "Qu'il a dûment acquis une partie dudit immeuble, savoir les lots numéros 458, 459 et 460 le dix-huitième jour de décembre 1864, par et en vertu de trois titres de concession, à lui accordés par Thomas Stephens, en sa qualité d'agent des officiers principaux de l'Ordonnance de Sa Majesté, comme propriétaire en fidéi-commis, pour Sa Majesté, ses héritiers et successeurs, du fief et seigneurie de Sorel, devant N.-D. Crébassa et collègue, notaires, en date du dix-huitième jour de décembre 1844, et l'autre partie du même immeuble, savoir les lots numéros 461, 462, et 463 le trente-unième jour de mai 1845, par et en vertu d'un titre de vente, pour bonne et valable considération, à lui consenti par Antoine Mandeville et Marie Peltier, son épouse, devant N.-D. Crébassa et collègue, notaires, en date dudit trente-unième jour de mai 1845, dûment enregistré au bureau d'enregistrement du comté de Richelieu, le troisième jour d'avril 1846, et il est, depuis les dates de sesdites acquisitions, propriétaire dudit immeuble par les quatre titres ci-dessus cités, à la suite desquels il est immédiatement entré en possession, ainsi qu'il appert aussi à

un titre de commutation, qu'il tient de la couronne, fait et passé devant Gendron et collègue, notaires, en date du 6 mars 1849; que, dans une cause mue en la Cour Supérieure, dans le district de Richelieu, portant le numéro 377, dans laquelle "Les commissaires d'écoles pour la municipalité de la ville de Sorel, dans le comté de Richelieu," sont demandeurs, et John George Crébassa, défendeur, l'immeuble sus décrit a été vendu judiciairement, le 13 juillet 1864, par le shérif du district de Richelieu, Pierre-Rémi Chevalier, mais que telle vente judiciaire, et l'adjudication qui en a été faite, sont nulles de plein droit, et de nulle valeur. 1° Parce que la vente n'a pas été annoncée dans la *Gazette du Canada*, conformément au chapitre treize des Statuts Refondus du Canada; 2° Parce que le shérif, Pierre-Rémi Chevalier, alors agissant, et qui a fait telle vente et adjudication, s'est indirectement porté adjudicataire, sous les noms de David-C. Francœur et Giroux, marchands de la cité de Montréal, y faisant affaires et commerce ensemble, sous le nom de "Francœur et Giroux," dont les noms ont été irrégulièrement entrés au procès-verbal de vente, et le premier desquels est, et était, au temps de ladite adjudication, son gendre, mais qui n'ont été que des prête-noms, pour couvrir la fraude et le dol et pour servir aux spéculations dudit Chevalier, en contravention à la loi; 3° Parce que ledit shérif Chevalier a usé de dol et de fraude, en écartant, par des moyens illicites, des privilèges et des faveurs pour certaines personnes, et, en refusant les mêmes privilèges et les mêmes faveurs à d'autres, et cela dans le but de se rendre lui-même adjudicataire pour un prix au-dessous de ce que les enchères seraient montées, sans telle partialité du shérif; 4° Que, notamment, ledit shérif a exigé, pour les enchères, des dépôts d'argent beaucoup plus considérables qu'il n'avait droit de le faire, et cela, dans le but d'écarter les enchérisseurs, et de se rendre, sous des noms simulés, le véritable adjudicataire, et d'acquérir les propriétés dudit opposant à vil prix; 5° Parce que lesdites vente et adjudication n'ont pu transmettre à l'adjudicataire un droit de propriété sur ledit immeuble; que ledit Chevalier, sous le nom de Francœur et Giroux, a, par acte de vente passé le treize d'août 1867, devant Précourt, notaire, revendu ledit immeuble au défendeur, mais que le dit Chevalier, n'a pu transporter plus de droits qu'il n'en avait, et il n'en avait aucun. A ces causes, l'opposant conclut à ce que la présente opposition soit déclarée bonne et valable; à ce que l'adjudication ou la vente dudit immeuble, faite le treizième jour d'août 1864, dans ladite cause n° 377, soit déclarée illégale et de nulle valeur, à ce qu'en conséquence, ladite vente faite par ledit Chevalier, ès-dits noms, au défendeur Barrette, devant Précourt, notaire, soit aussi annulée; à ce que l'opposant

soit déclaré être, et avoir toujours été le propriétaire réel dudit immeuble, depuis la date de ses titres sus-cités, et, en conséquence ; à ce que ledit immeuble soit déclaré sa propriété et lui soit adjugé ; à ce que ledit Chevalier, lesdits Francœur et Giroux et le défendeur Barrette soient mis en cause pour voir, dire et déclarer lesdites vente et ajudication dudit immeuble, nulles. Le demandeur contesta cette opposition et allégua : que ladite opposition et tous les allégués y contenus sont faux et insuffisants en droit, pour en faire obtenir les conclusions : 1° Parce que l'opposant ne pouvait et ne peut demander la nullité du décret fait le treize juillet 1864, dans la cause mue devant la Cour Supérieure, siégeant dans le district de Richelieu, portant le numéro 377, dans laquelle " Les Commissaires d'Ecole pour la ville de Sorel " étaient demandeurs, et l'opposant était défendeur, par une opposition à fin de distraire, et que telle nullité de décret ne peut être invoquée que dans la cause même où il a été fait, et avec les formalités et dans le temps voulus par la loi ; 2° Parce que telle nullité de décret ne pouvait être demandée que dans l'année de la date d'icelui ; 3° Parce que tels moyens pouvaient, et peuvent être invoqués dans une requête en nullité de décret, faite dans la cause même dans laquelle le décret a eu lieu, mais ne pouvaient et ne peuvent faire la matière d'une opposition de la nature de celle que le demandeur conteste actuellement ; 4° Parce que l'opposant ne peut être déclaré le propriétaire de l'immeuble saisi, qu'après avoir fait déclarer nul, et avoir fait rescinder, avec les formalités et dans le temps voulus par la loi, le décret du treize juillet 1864.

Le jugement de la Cour Supérieure est en ces termes : " La cour, considérant que l'opposant ne pouvait, *de plano*, s'opposer à la présente saisie, et réclamer l'immeuble sous mains de justice, sans avoir, au préalable, fait annuler le décret dont il demande la nullité, et ce, dans la cause où il a eu lieu, ledit décret n'étant pas, pour les causes qu'il invoque, nul de plein droit, mais annulable, a maintenu et maintient la défense en droit du demandeur, et a débouté et déboute l'opposant de son opposition."

La cause fut ensuite portée en revision, et Germain, avocat du contestant, soutint les propositions suivantes devant cette cour : L'incapacité du shérif à se rendre adjudicataire à la vente d'immeubles, faite par lui, est assimilée, par notre loi, à l'incapacité des tuteurs, curateurs, administrateurs et autres mandataires chargés de vendre les biens d'autrui. Il est déclaré, comme les autres mandataires susdits, incapable de se rendre acquéreur des biens qu'il est chargé de vendre ; mais cette incapacité n'est pas d'*ordre public*, elle est établie par la loi pour prévenir les fraudes que le shérif pourrait commettre, comme les autres

mandataires, contre les intérêts des autres créanciers et du saisi, c'est-à-dire contre les intérêts de ceux dont il est mandataire. Cette incapacité n'est donc que *relative*, et elle ne peut être invoquée que par ceux en faveur de qui elle est établie. Les termes de la section 7, Stat. Ref. Bas-Canada, chap. 85, ne laissent pas de doute que cette incapacité n'est établie qu'en faveur des *parties dans la cause*, et qu'elles seules peuvent l'invoquer. Les commissaires d'école de la ville de Sorel, et l'opposant en cette cause, pouvaient donc seuls invoquer l'incapacité du shérif Chevalier, à se rendre adjudicataire au décret dont l'opposant demande la nullité par son opposition. Dans ce cas, l'opposant devait se prévaloir contre le décret, par et avec les formes voulues par la loi, et dans le délai d'un an à compter du décret; il ne peut le faire par une opposition, comme dans la présente cause. Le délai doit être de rigueur, surtout dans le cas actuel, où l'adjudication a été faite à Francœur et Giroux, qui ont disposé de l'immeuble. Ne serait-ce pas une souveraine injustice, vis-à-vis des tiers de bonne foi, (et, dans le cas actuel, vis-à-vis du demandeur), que de permettre une demande en nullité de décret, cinq ans après tel décret, lorsque l'adjudication s'est faite régulièrement, du moins aux yeux public ? Les articles 715 et 716 du Code de Procédure civile ne sont pas de droit nouveau; ils ne sont que déclaratoires du droit suivi avant la mise en force du Code de Procédure. Voir particulièrement. 1° Le préambule de l'acte 20 Vict., ch. 43 et les secs 4-5-6-7-14-16; 2° Le préambule de l'acte 29-30 Vic., chap. 25, et les sections 1-2-3-4-5; 3° La proclamation du gouverneur Michel mettant le Code de Procédure en force. Autorités établissant les propositions ci-dessus: *L.-B. Bouvier* vs *George Brush et al.* (1); Stat. Ref. du

(1) Le ch. 85 des S. R. B. C. de 1861, intitulé: "Acte concernant les saisies et ventes par autorité de justice," décrétait sec. 4, § 1, sec. 15, §§ 1, 2 et 3, sec. 17, § 3, et sec. 22: "**4.** Lorsque des immeubles sont saisis par le shérif en vertu d'un bref d'exécution, il en annoncera la vente par trois différentes fois dans la *Gazette du Canada*, pour être procédé à ladite vente à un jour fixé après l'expiration de quatre mois du jour de la date de la première annonce, et si la saisie est faite dans une paroisse, il publiera ladite vente à la porte de l'église de la paroisse où seront situés les biens, immédiatement après le service divin, pendant les trois dimanches consécutifs qui précèderont la vente, et fera afficher une copie de ladite annonce à la porte de l'église paroissiale; etc. **15.** Nulle opposition à la vente d'un immeuble saisi par le shérif sur un bref d'exécution, soit à fin d'annuler ladite saisie, soit à fin de distraire le tout ou partie des biens saisis, ou à fin de charge ou servitude sur lesdits biens, ne sera logée entre les mains dudit shérif ou reçue par lui, à moins que ce ne soit avant les quinze jours précédant celui fixé pour la vente et adjudication desdits biens: 2. Et nulle telle opposition ne sera reçue par le shérif à la vente d'un immeuble qui a lieu en vertu d'un bref de *venditioni exponas*, quand toutes les premières annonces et avertissements de la vente en vertu de la première exécution, auront été faits et publiés suivant la loi; pourvu toujours, que le shérif ait fait mention en annonçant la vente que telle opposition ne sera pas reçue durant les quinze jours précédant la vente comme susdit; 3. Mais celui qui

B. C., page 813, chap. 85, sec, 7 ; article 676 Code de Procédure Civile ; articles 710 et 716 Code de Procédure Civile B. C.; article 1484 du Code Civil du B. C. L'ancien article 713 du Code de Proc. Civ. français, avec les commentaires de Rogron, édit. Belge, page 267, bas de la 1ère colonne, et page 267, bas de la 2e colonne, forme aujourd'hui l'art. 711 du même Code amendé. Carré et Chauveau, vol. 4, page 254 de l'édit. Belge, *Commentaires des Commentaires*, n° 2400. Marcadé, *Traité de la Vente*, vol. 6, page 195, par. 111. Paignon, *Vente des Immeubles*, vol. 1, pages 172 à 176 ; à cette dernière page il est dit : " que cette nullité n'est pas d'ordre public, qu'elle est toute " dans l'intérêt du poursuivant et des créanciers qui restent " les maîtres de faire une nouvelle mise aux enchères, suivant " qu'ils trouveront leur avantage dans l'un et l'autre cas." Pothier, Proc. Civile, vol. 10 de l'éd. Bugnet, pages 299, 300, 301 et 302. A cette dernière page, il est dit qu'un des moyens d'appel du décret (et cet appel doit se faire sous un an de la date du décret), est l'incapacité de l'acquéreur à se rendre l'adjudicataire. Il est bon de remarquer que cette décision de Pothier est précisément l'autorité citée sous les articles 715 et 716 de notre Code de Procédure, qui déterminent la forme et le délai pour procéder à la nullité du décret. Sous le nouveau droit français, l'adjudication n'est plus considérée comme *jugement*, mais seulement comme un *acte judiciaire* ; c'est pourquoi les demandes en nullité de décret doivent se faire par

néglige de faire telle opposition avant les quinze jours précédant immédiatement celui fixé pour la vente dudit immeuble comme il est dit ci-dessus, pourra convertir son droit à telle opposition, en opposition à fin de conserver sur le produit de la vente dudit immeuble, laquelle il pourra toujours produire dans le délai fixé pour produire telle opposition à fin de conserver. **17.**—3. Lorsqu'une opposition, de la nature en dernier lieu mentionnée ci-dessus, est logée entre les mains du shérif, ce dernier ne retardera ni ne suspendra pas les annonces et publications de la vente des biens saisis, mais il ne procèdera pas à la vente d'iceux avant que telle opposition n'ait été jugée et décidée. **22.** Chaque fois que la vente d'un immeuble saisi par exécution aura été suspendue par opposition,—alors quand telle opposition aura été admise ou renvoyée, ou si la cour pour une raison quelconque ordonne que la vente continue,—la cour ordonnera au shérif, ou autre officier, à l'instance du demandeur, ou du défendeur ou de toute partie opposante, de procéder de nouveau à la vente dudit immeuble, après trois annonces données pendant trois dimanches consécutifs, à la porte de l'église de la paroisse où est situé ledit immeuble (si c'est une paroisse), et deux annonces dans un papier public ou gazette ; et toutes les dispositions des quatre sections précédentes s'appliqueront à telle vente et aux enchérisseurs à telle vente, et à toutes matières y relatives, tout comme si telle vente était faite en conséquence d'une folle enchère." Le ch. 39 des Statuts du Canada de 1864, 27-28 Vict., intitulé : " Acte pour diminuer les frais des ventes en justice et des ratifications de titres, etc.," décrétait sec. 1 : " Il ne sera pas nécessaire que le shérif chargé de l'exécution d'un bref ou d'un *alias* bref de *fieri facias de terris* ou de *venditioni exponas* contre un immeuble, ou la partie poursuivant la licitation forcée d'un immeuble, donne avis de la vente ou du jour fixé pour l'adjudication de tel immeuble, à la porte de l'église de la paroisse dans laquelle il est situé, ni l'un ni l'autre des deux dimanches qui précéderont immédiatement cette vente ; mais il sera suf-

une action directe ; mais nous sommes régis par l'ancien droit français, et notre Code maintient l'adjudication comme un *jugement*, contre lequel on ne peut se pourvoir que dans les délais de l'appel, c'est-à-dire le délai d'un an. D'après le nouveau droit français, l'action pour faire résilier un décret dure trente ans, mais c'est l'ancien droit français qui nous régit, et qui ne donnait que le délai pour l'appel d'un jugement, savoir un an. Voir les notes de Bugnet, p. 300, vol. 10 de Pothier suscité. D'Héricourt, *Vente des Immeubles*, et Pigeau, Proc. Civ., disent la même chose que Pothier, et soutiennent les mêmes principes.

La Cour de Revision a confirmé le jugement de la Cour Supérieure. (2 *R. L.*, p. 98)

fisant que cet avis soit donné le premier des trois dimanches qui précèderont immédiatement la vente ou le jour fixé pour l'adjudication, nonobstant toute chose à ce contraire contenue dans les quatrième, dix-huitième ou vingt-deuxième sections du chapitre quatre-vingt-cinq des Statuts Refondus pour le Bas-Canada, ou dans la quatrième section du chapitre quarante-huit desdits statuts, ou dans tout autre acte ou loi." Il a été jugé, sous ces dispositions, qu'une saisie d'immeuble ne sera pas invalidée parce que les annonces et criées à la porte de l'église n'auraient pas été faites sur le bref de *Fieri Facias*, ces annonces ne servant, lorsqu'il y a une opposition au bref de *Fieri Facias*, que dans le cas où l'opposition est décidée avant le jour fixé pour la vente ; que, lorsque les annonces et criées à la porte de l'église n'ont pas été faites, mais que les autres formalités prescrites par la loi ont été observées, le saisissant n'est pas tenu de recommencer la saisie et les annonces dans la *Gazette Officielle*, mais peut procéder à la vente de l'immeuble saisi sur un bref de *Venditioni Exponas*, en observant les formalités ordinaires de cette procédure ; que, dans ce dernier cas, le saisi ou tout autre peut produire une opposition à la saisie, parce que la défense de produire des oppositions à fin d'annuler, à fin de distraire, ou à fin de charge, sur un bref de *Venditioni Exponas*, pour des causes antérieures à ce bref, ne s'applique qu'au cas où les annonces et criées à la porte de l'église ont été faites sur le bref de *Fieri Facias* ; que le saisi est tenu de se pourvoir contre les nullités de procédures antérieures à la vente par opposition formée en temps utile, et ces nullités sont couvertes par le consentement tacite du saisi, s'il laisse procéder à la vente sans s'y opposer. Arts 650, 653, 663 et 664 C. P. C. (*Bouvier* et *Brush et al.*, C. B. R. en appel, Montréal, 8 mars 1870, CARON, J., DRUMMOND, J., LORANGER, J., et JOHNSON, J., confirmant le jugement de C. S. R., Montréal, 30 décembre 1865, BADGLEY, J., MONK, J., et BERTHELOT, J., dissident, qui avait confirmé le jugement de C. S., Montréal, 30 juin 1865, MONK, J., 10 J., p. 194 ; 1 L. C. L. J., p. 110 ; 1 R.L., p. 461, et 15 R. J. R. Q., p. 159)

DROITS DU CURE.—ENFANTS DE CHOEUR.

COUR DE CIRCUIT, Montréal, 30 octobre 1869.

Coram BERTHELOT, J.

VICTOR BOUDREAULT, demandeur, *vs* LES CURÉ ET MARGUILLIERS DE L'ŒUVRE ET FABRIQUE DE LA PAROISSE DE LA VISITATION DU SAULT-AU-RÉCOLLET, défendeurs.

Jugé: Que, lorsqu'un chantre dans une église se conduit d'une manière insolente et inconvenante vis-à-vis du curé de la paroisse, il peut être expulsé du chœur et renvoyé comme chantre, et, dans ce cas, la fabrique n'est tenue que de lui payer son salaire jusqu'au temps du renvoi.

PER CURIAM: Le demandeur a poursuivi les défendeurs, pour recouvrer d'eux la somme de $100, pour une année de salaire comme chantre dans l'église de la paroisse du Sault-au-Récollet, depuis le 17 janvier 1867 au 1er janvier 1868. Le demandeur allègue qu'il avait été employé comme chantre pendant près de quarante ans, au prix de $400 à venir à l'année 1864, et au prix de cent piastres par année, à commencer du 31 décembre 1864; qu'il a rempli ses fonctions de chantre durant les années 1865 et 1866, et qu'il commença l'année 1867, lorsque, le 17 mars de cette année, les défendeurs, sans avis préalable, lui intimèrent de quitter le chœur de l'église et de cesser d'agir comme chantre; que le défendeur les protesta de son intention de continuer ses fonctions durant toute l'année et d'être payé de son année entière. Les défendeurs ont plaidé que le curé desservant d'une paroisse est, par la loi et la coutume du pays, le maître absolu dans le chœur de l'église de sa paroisse, et a seul le droit d'y admettre et d'en expulser ceux qui y prennent place; que la conduite du demandeur, durant les mois de janvier et février, et le commencement de mars 1867, pendant qu'il exerçait ses fonctions de chantre, et que, comme tel, il occupait une place au chœur de l'église, avait été tellement inconvenante et reprochable, que le curé desservant (Mgr. Vinet) fut dans la nécessité de lui défendre l'entrée du chœur de l'église. Ils alléguaient qu'il y prenait des positions inconvenantes durant les offices, et qu'il avait été jusqu'au point, dans une occasion, de parler tout haut, pendant que le curé faisait son prône; que sa conduite avait été telle, qu'il avait été poursuivi et condamné en police correctionnelle, pour avoir tenu une conduite indécente et irrévérente dans l'église, pendant le service divin de l'avant-midi du dimanche, 13 mars 1867, et avoir troublé le bon ordre dans l'église, pendant qu'il y occupait une place dans le chœur comme chantre. Cet allé-

gué des défendeurs est appuyé par une copie de la conviction prononcée par le Magistrat de Police, à Montréal. Les défendeurs se plaignent aussi du grand âge du demandeur, et de son incapacité. Dans ces circonstances, les défendeurs ont offert au demandeur, en l'expulsant du chœur, de lui payer $25, pour trois mois de salaire, jusqu'au 31 mars 1867, laquelle somme a été offerte à deniers découverts, et consignée au greffe avec l'exception plaidée.

"La cour, considérant que le demandeur avait été engagé par les défendeurs comme chantre au chœur et dans l'église de la paroisse du Sault-au-Récollet pour l'année 1866, à raison de cent piastres pour ladite année, et qu'il y a rempli ses devoirs comme tel pendant près de trois mois de cette année 1867; considérant, cependant, que, durant le temps que le demandeur a ainsi agi comme chantre, durant les trois premiers mois de l'année 1867, il s'est comporté d'une manière inconvenante et irrévérente, à sa place, au chœur, comme chantre, et qu'il s'est comporté, à diverses reprises, d'une manière insolente et inconvenante vis-à-vis de Monseigneur J. J. Vinet, le curé de la paroisse, et l'un des défendeurs, de manière à justifier son expulsion comme chantre du chœur de l'église, ainsi qu'il a été fait en mars 1867, sur les ordres dudit Mgr Vinet, en sa qualité et capacité de curé de la paroisse, et qu'en ce cas, les défendeurs ès-qualité ne peuvent être tenus, tout au plus, que de lui payer son salaire, proportionnellement au temps qu'il a servi comme chantre, et jusqu'au jour de son expulsion comme susdit: Vu que les défendeurs ont offert, avant l'institution de cette action, au demandeur, $25, pour trois mois de salaire comme chantre, en janvier, février et mars 1867, et, vu leurs offres de même somme renouvelées par leur plaidoyer, avec dépôt devant cette cour: a ordonné que cette somme soit remise et payée au demandeur, pour toute compensation de ce qu'il demande par son action, et l'en a débouté, quant au surplus, avec dépens de l'action contestée. (1 *R. L.*, p. 663)

J.-A. DAVID, pour le demandeur.

CARTIER, POMINVILLE et BÉTOURNAY, pour les défendeurs.

DEPENS.

COUR DE CIRCUIT, Richelieu, 25 novembre 1868.

Coram LORANGER, J.

LA CORPORATION DE LA PAROISSE DE SAINT-AIMÉ *vs* JOSEPH CONTOIR.

Jugé: Que, lorsque le défendeur aura consenti à plaider, *comme appelable*, une cause qui pourrait ne pas l'être, il devra payer les frais d'une cause appelable.

Il s'agit d'une motion pour faire reviser le mémoire de frais taxé par le greffier. L'action intentée pour une somme de $4.00, due sur une répartition de travaux publics faits, en vertu d'un procès-verbal, a été portée appelable. Le défendeur ne s'est pas objecté à cela, mais, au contraire, a adopté, pour sa défense, la procédure d'une cause appelable. De côté et d'autre, l'instruction de la cause s'est faite comme dans une cause appelable. Le jugement ayant été rendu en faveur de la demanderesse, et les frais taxés comme dans une cause appelable, le défendeur fait motion pour faire reviser le mémoire de frais, en prétendant que la cause n'était pas appelable, et que le mémoire de frais de la demanderesse aurait dû être taxé comme dans une action de dernière classe, *non appelable*, à la Cour de Circuit. Le jugement de la cour a renvoyé la motion et maintenu la taxe du mémoire telle qu'accordée par le greffier, sur le principe que le défendeur aurait dû s'objecter préliminairement à ce que la cause fût instruite comme elle l'a été: qu'ayant consenti à plaider comme dans une cause appelable, il devait payer les frais d'une action de cette classe. Une semblable décision a été rendue en février 1861, par le juge Bruneau, dans une cause de *Saint-Ours* vs *Chapdelaine*, à la Cour de Circuit de Richelieu. (1 *R. L.*, p. 666)

A. GERMAIN, pour la demanderesse.

ARMSTRONG et GILL, pour le défendeur.

ACTE AUTHENTIQUE.—TEMOIN.—TRANSPORT.

COUR DE REVISION, Montréal, 28 février 1868.

Coram MONDELET, BERTHELOT, MONK, JJ.

J.-G. CREBASSA, demandeur, *vs* DAME L. CREPEAU, défenderesse, et F.-X. ROBITAILLE, tiers-saisi.

Jugé: 1° Que les clercs et serviteurs du notaire qui reçoit un acte authentique, consenti par des parties qui ne savent pas signer leur nom, peuvent servir de témoins à tel acte.

2° Que la prohibition d'appeler comme témoin à un acte les clercs et les serviteurs du notaire instrumentaire, ne s'applique qu'aux testaments, conformément à l'article 844 du Code Civil, et ne peut être étendue aux actes authentiques ordinaires, en vertu de la dernière partie de l'article 1208.

3° Qu'un transport n'est pas nul par le fait que le cessionnaire ne l'a pas accepté personnellement, ni par un procureur spécialement autorisé à cette fin; et que l'acceptation du notaire pour le cessionnaire est valable, pourvu que ce dernier ratifie telle acceptation par des actes subséquents.

4° Que l'enregistrement du transport, à la réquisition du cessionnaire, est une ratification suffisante de l'acceptation faite par le notaire.

5° Que le transport d'une créance enregistrée est parfait par l'acceptation du débiteur, et l'enregistrement subséquent à l'acceptation; qu'il n'est pas nécessaire, lorsqu'il y a acceptation du débiteur, de lui fournir un double du certificat d'enregistrement.

La défenderesse ayant vendu une propriété au tiers-saisi, Robitaille, en transporta le prix à Francœur. Ce transport fut accepté par le tiers-saisi. L'acte de vente avait été enregistré. Le transport le fut à la requisition du cessionnaire Francœur, mais après l'acceptation du débiteur Robitaille. Francœur n'était pas présent au transport. Le notaire l'a accepté pour lui. La défenderesse et le tiers-saisi ne sachant signer, le notaire a fait servir son clerc comme témoin instrumentaire. Subséquemment à cela, le demandeur ayant logé une saisie-arrêt entre les mains du tiers-saisi Robitaille, ce dernier déclara qu'il ne devait rien à la défenderesse. Le demandeur contesta cette déclaration, en alléguant fraude et collusion, et, de plus, en prétendant: 1° Que le transport, par la défenderesse à Francœur, était radicalement nul, parce que la défenderesse et le tiers-saisi ne sachant signer, il aurait fallu un témoin idoine au transport, et que c'était le clerc du notaire recevant ce transport (lequel n'était pas un témoin idoine), qui avait servi comme témoin; 2° Que ce transport était nul, par le fait qu'il n'avait pas été accepté par le cessionnaire, ne l'ayant été que par le notaire qui n'avait pas d'autorisation à cette fin: 3° Que le transport n'avait pas eu l'effet de dessaisir la défenderesse de sa créance, et d'en saisir le cessionnaire, vis-à-vis

des tiers, attendu qu'une copie enregistrée n'en avait pas été signifiée à Robitaille, le débiteur; que, conséquemment, il ne pouvait avoir d'effet à l'encontre du demandeur, qui était un tiers. Le demandeur raisonnait les propositions ci-dessus comme suit: 1° L'article 1208 du Code Civil, après avoir déclaré que, pour qu'un acte soit authentique, lorsque les parties contractantes, ou l'une d'elles, ne peuvent signer, il faut la présence actuelle d'un autre notaire, ou d'un témoin qui y signe, ajoute, *in fine*, que cet article est sujet aux dispositions qui ont rapport aux testaments. Or, on voit à l'article 844, qui concerne les testaments, que les témoins à ces actes ne peuvent être *clercs* et *serviteurs* du notaire qui reçoit le testament. Donc, les actes ordinaires, qui sont sujets aux dispositions concernant les testaments, ne peuvent être signés par un témoin qui serait le clerc ou le serviteur du notaire instrumentaire. 2° L'acceptation du transport a été faite, pour et au nom du cessionnaire, par le notaire instrumentaire, et rien n'indique qu'il était autorisé à cela. Le notaire n'a pas droit de faire une pareille acceptation, et, si on admettait une semblable pratique, on verrait, tous les jours, des débiteurs malhonnêtes faire des transports de leurs créances à n'importe qui, et frustrer ainsi leurs créanciers. Il n'y a aucun lien de droit entre Robitaille, le débiteur de la créance cédée, et Francœur, le cessionnaire, parce qu'une convention quelconque doit être arrêtée, convenue et acceptée par toutes les parties contractantes, et que, dans le cas actuel, une des parties contractantes n'a pas accepté le transport. La raison de la décision, dans la cause *Perrault & vir* vs *La Banque Ontario*, vol. 7 du Juriste, p. 313, (1) est fondée sur un principe différent de celui-ci. Dans

(1) Le transport ou la vente d'une créance est valable, si ce transport est passé devant notaire, et est accepté pour le cessionnaire par le notaire qui reçoit l'acte, et est ensuite signifié au débiteur, par ce notaire, à la réquisition de ce cessionnaire; cette signification ayant l'effet mentionné dans la section 11 du chapitre 39 des statuts du Canada de 1850, 13 et 14 Victoria, intitulé: "Acte pour annuler et refondre l'acte qui pourvoit à l'organisation du notariat dans le Bas-Canada," qui se lit comme suit: "Les notifications, significations et protestations faites par les notaires, à la réquisition d'une partie et sans qu'elle ait accompagné les notaires ou le notaire ni signé l'acte, seront authentiques et feront preuve par elles-mêmes de leur contenu jusqu'à récusation ou désaveu par la personne (ou autres ayant droit) au nom de qui ces significations, notifications et protestations auront été faites; et nonobstant toutes lois ou décisions judiciaires à ce contraires, les notaires continueront de la même manière que les avocats et procureurs peuvent le faire, à signer au nom des parties requérantes et sans autre pouvoir spécial, des requêtes ou pétitions requises pour demander la convocation des assemblées de parents et amis, lorsqu'il s'agit de tutelle, curatelle, vente de biens immeubles de mineurs ou interdits, partages ou licitations, et autres semblables affaires de famille et succession." V. art. 1570 C. C. (*Perrault et vir* vs *La Banque d'Ontario*, C. B. R. en appel, Montréal, 19 novembre 1863, LAFONTAINE, J. en C., DUVAL, J., MEREDITH, J. et MONDELET, J., renversant le jugement de C. S., Montréal, 26 décembre 1860, SMITH, J., 7 J., p. 313; 14 D. T. B. C., p. 1, et 12 R. J. R. Q., p. 199)

cette cause-là, le transport avait été signifié, à la réquisition du cessionnaire, et l'on doit présumer que le notaire qui fait une signification, au nom d'une personne, a reçu de cette personne instruction de faire telle signification. Dans le cas actuel, il n'y a eu ni signification ni ratification quelconque du transport. 3° L'article 2127 du Code Civil ordonne ce qui suit: " Toute cession ou transport, volontaire ou judiciaire, de " créances privilégiées ou hypothécaires doit être enregistrée " au bureau d'enregistrement où le titre créant la dette a été " enregistré. Un double du certificat de l'enregistrement doit " être fourni au débiteur avec la copie du transport. A défaut " de l'accomplissement de ces formalités, la cession ou trans- " port est sans effet à l'encontre d'un cessionnaire subséquent " qui s'est conformé aux prescriptions ci-dessus." Or la créance transportée est une créance hypothécaire. Le transport de cette créance, pour avoir effet vis-à-vis des tiers, devait être enregistré, et un double du certificat d'enregistrement fourni à Robitaille. Jusqu'à l'accomplissement de ces formalités, Robitaille n'a pas cessé d'être le débiteur de la défenderesse vis-à-vis des tiers, quand même il aurait accepté le transport. La saisie-arrêt est un transport forcé, opéré par l'autorité judiciaire en faveur du créancier. Dans le cas actuel, le demandeur saisissant doit être considéré, par le fait de la saisie-arrêt, comme un tiers cessionnaire, ayant droit de se plaindre du défaut des formalités exigées par l'article 2127. Donc le transport de la défenderesse à Francœur n'est pas valable vis-à-vis du demandeur, et la saisie-arrêt doit être maintenue. A ces prétentions, le tiers-saisi répondait ce qui suit: 1° L'article 1208 du Code Civil ordonne que l'acte authentique soit reçu par un notaire, en la présence d'un témoin idoine, lorsqu'une des parties à l'acte est incapable de le signer; mais il indique *spécialement* l'espèce de témoins qu'il exige; leur âge, leur qualité, leur état civil et leurs rapports avec les parties: " Les témoins doivent être mâles, âgés d'au moins " vingt et un ans, sains d'esprit, n'être parents d'aucune des " parties jusqu'au degré de cousin germain inclusivement, ni " intéressés dans l'acte, ni morts civilement, ni réputés infâmes " en loi. Les aubains peuvent servir de témoins aux actes notariés." La loi a jugé à propos de refuser certains témoins, mais ceux-là seulement. *Qui de uno negat de altero dicit.* Lorsque la loi a des dispositions restrictives, on ne doit pas aller au-delà des termes de la prohibition; mais, au contraire, on doit accepter comme admis par la loi tout ce qui n'est pas renfermé dans le cercle de la restriction. Dans le cas qui nous occupe, les clercs et serviteurs du notaire instrumentaire ne sont pas mentionnés dans la catégorie des témoins déclarés inhabiles par la loi; ils sont donc témoins idoines. Il est

vrai que la dernière partie de l'article 1208 l'assujettit aux dispositions qui ont rapport aux testaments, mais ce ne peut être pour ce qui concerne les témoins; autrement, l'article 1208 n'aurait pas mentionné l'espèce de témoins requis pour les actes authentiques ordinaires; il aurait fait une référence générale à l'article 844, qui indique quels témoins sont requis pour les testaments. 2° L'acceptation du transport par le notaire est valable et suffisante à toutes fins que de droit. Pour s'en convaincre, il suffit de référer à la cause de *Perrault et vir* vs *La Banque d'Ontario*, rapportée au vol. 7 du Juriste, 12 *R.J. R.Q.*, p. 199, et *suprà*, p. 423, où la question a été décidée dans l'affirmative. Dans le cas actuel, il y a eu acceptation et ratificationformelle du transport, par le fait qu'il a été enregistré à la *réquisition du cessionnaire*, ce qui appert au certificat d'enregistrement produit avec la copie du transport. 3° L'article 2127 du Code Civil exige, il est vrai, l'enregistrement du transport d'une créance enregistrée, et la délivrance au débiteur d'un double du certificat d'enregistrement, pour rendre valable ce transport et lui donner effet à l'encontre d'un cessionnaire subséquent; mais 1° le demandeur n'est pas et ne peut pas être considéré comme un cessionnaire subséquent. La saisie-arrêt, maintenue par l'autorité judiciaire, opère, en faveur du créancier saisissant, un transport forcé de ce que doit le tiers-saisi au débiteur saisi, mais ce transport n'a d'existence qu'autant que le jugementl'a opéré. Tant que le jugement n'est pas rendu, il n'y a pas de transport. Or, dans le cas actuel, Crébassa, qui demande d'être forcément subrogé aux droits de la défenderesse contre le tiers-saisi, ne peut pas prétendre qu'il est dans la position d'un cessionnaire subséquent; et 2° la loi qui oblige l'enregistrement du transport a en vue l'interêt des tiers, mais ce n'est pas pour le débiteur qu'elle exige l'enregistrement. Pour celui-ci, la signification du transport ou son acceptation suffit pour l'obliger à reconnaître le cessionnaire, pour son nouveau créancier. L'enregistrement n'est nécessaire que pour un cessionnaire subséquent. Dans le cas actuel, Robitaille, le débiteur, ayant accepté le transport, s'en est trouvé valablement saisi. Le transport ayant ensuite été enregistré s'est trouvé parfait vis-à-vis des tiers. Pour ces deux raisons, le transport ne peut être déclaré sans effet, parce qu'un double du certificat d'enregistrement n'a pas été signifié au tiers-saisi.

Le juge LORANGER, présidant la Cour de Circuit de Richelieu, a, pour les raisons alléguées par le tiers-saisi, débouté la contestation de la tierce-saisie, et déclaré le rapport valable.

Voici le jugement rendu le 4 mai 1867 : " La cour, considé-
" rant que le demandeur a failli dans la preuve de ses moyens
" de contestation de la déclaration du tiers-saisi, alléguant
" la fraude de cette déclaration, et la collusion du tiers-saisi

" avec la défenderesse pour frauder le demandeur; qu'il est
" de plus en preuve que par le transport *valablement fait et*
" *accepté* en faveur de Francœur, par acte reçu devant Pré-
" court, notaire, le cessionnaire a été saisi de la créance de
" $235 due par le tiers-saisi, qui ne devait rien à la défende-
" resse, lors de la signification de la saisie-arrêt; et qu'il ré-
" sulte de ce que dessus que la déclaration a été sincère, et les
" moyens de contestation mal fondés, a débouté et déboute le
" demandeur de sa contestation, avec dépens, et accorde au
" tiers-saisi mainlevée de la saisie-arrêt."

Le demandeur a inscrit cette cause devant trois juges de la Cour Supérieure, siégeant à Montréal comme Cour de Revision, et cette dernière cour a confirmé le jugement du juge Loranger sur tous les points soulevés par les parties. (1 *R. L.*, p. 667)

D.-Z. GAUTHIER, pour le demandeur.

A. GERMAIN, pour le tiers-saisi.

MANDAMUS.—PROCEDURE.

COUR SUPÉRIEURE, Trois-Rivières, 15 juillet 1869.

Coram POLETTE, J.

JACQUES-EUSÈBE BUREAU, de la cité des Trois-Rivières, étudiant en droit, demandeur, *vs* CHARLES-BORROMÉE GENEST, AUGUSTE BARTHÉLEMI CRESSÉ, JOSEPH-NAPOLÉON BUREAU, HENRI-GÉDÉON MALHIOT, LOUIS-GASPARD BOURDAGES, tous avocats de la cité des Trois-Rivières et composant le comité des examinateurs du Barreau du Bas-Canada, section du district des Trois-Rivières, défendeurs.

Jugé : 1° Qu'un bref de *mandamus* doit être adressé individuellement aux membres du bureau de direction d'une corporation ou aux officiers qui doivent accomplir, pour la corporation, l'acte requis, de manière à les contraindre personnellement à accomplir le devoir demandé et à rendre sujet à l'emprisonnement ceux d'entre eux qui refuseraient l'obéissance au bref péremptoire de *mandamus*.

2° Que, sur cette poursuite personnelle, les défendeurs ne sont pas tenus de se joindre pour répondre à la requête libellée, mais que chacun d'eux peut répondre pour lui-même sans le concours des autres.

POLETTE, J. : Le requérant demande un *mandamus* enjoignant aux défendeurs, qui forment le comité des examinateurs du barreau du Bas-Canada, section du district des Trois-Rivières, de l'examiner sur ses connaissances légales et ses qualifications pour la pratique de la profession d'avocat, et,

s'il est jugé capable et qualifié, de lui octroyer un diplôme d'admission à cette profession. Sur le retour de l'action, les défendeurs, Auguste-Barthélemi Cressé et Joseph-Napoléon Bureau, ont comparu séparément et ont répondu à la requête libellée qu'ils avaient toujours été et étaient encore prêts à faire l'acte requis. Les défendeurs, Gédéon Malhiot et Louis-Gaspard Bourdages, ont aussi comparu séparément, mais n'ont pas répondu à la requête libellée. Le défendeur Charles-Borromée Genest a comparu, et, seul, a plaidé à la requête libellée. Sa défense se compose de trois plaidoyers, une exception à la forme, une exception péremptoire et une défense en fait. Voyons les moyens contenus dans son exception à la forme: 1° Il prétend que les examens étant fixés par la loi à époques fixes, savoir aux premiers lundis de janvier et juillet, la requête demandant un *mandamus* enjoint une chose impossible, en ordonnant d'examiner le demandeur avant les époques fixées, et que la requête libellée ne fait pas même voir quand et où il pourra être examiné, ce qui la rend nulle et de nul effet. Mais la cour a le droit d'ordonner l'exécution de l'acte requis à n'importe quel temps; elle n'est pas astreinte aux délais; elle a le droit d'ordonner la réparation immédiate d'une erreur ou d'une omission dans l'exécution d'un devoir qui devait être accompli à un jour fixe, et qui ne l'a pas été. Si les défendeurs ne se sont pas conformés à leurs obligations au temps où ils devaient le faire, le demandeur n'est pas obligé de souffrir de nouveaux délais et il a le droit de demander que les défendeurs soient tenus de réparer immédiatement leur erreur, ou leur omission à son égard. 2° Le second moyen invoqué dans l'exception à la forme est que le bref d'assignation devait *être* adressé à la section du district des Trois-Rivières. Cette objection n'est pas fondée en loi. La section n'a pas le pouvoir d'examiner; elle n'a que celui de nommer un comité d'examinateurs, sur qui elle n'a ni contrôle ni juridiction d'appel. Mais, du reste, le bref de *mandamus* peut être adressé à celui ou à ceux qui doivent agir. Il n'est pas nécessaire de poursuivre la corporation elle-même; on peut s'adresser aux officiers dont le devoir est d'accomplir, pour la corporation, l'acte requis. "It is a general " rule, that wherever an act of Parliament gives power to, or " imposes an obligation on a particular person, to do some part- " icular act or duty, and provides no specific legal remedy on " non-performance, the court will, in order to prevent a failure " of justice, grant, *ex debito justitiæ*, a *mandamus* to command " the doing of such act or duty. It lies also to command the " due execution of the powers of a local and personal act, " which cannot be compelled by any specific legal remedy, as " to hear the adjournment of an appeal" (Tapping, *On Man-*

damus, page 30). Idem, pages 84, 96, 100, 102. 3° La troisième objection se plaint que les affidavits et la déclaration sont insuffisants; que l'un émet seulement une opinion légale, et que les autres ne font pas voir que le demandeur a étudié aux Trois-Rivières. Les affidavits sont suffisants. Dans l'un il est juré que les allégués sont vrais, et, dans l'autre, il est allégué que le demandeur a eu des certificats constatant le temps d'étude aux Trois-Rivières. Le demandeur a rencontré ces plaidoyers par des réponses en droit, par lesquelles il prétend qu'un seul des défendeurs ne pouvait pas plaider séparément, qu'il fallait l'action conjointe de tous les défendeurs, ou de la majorité d'eux. Cette prétention serait fondée s'il s'agissait de la défense d'une corporation assignée en nom collectif. Une corporation est un être de raison, une personne fictive ou morale qui agit sous son nom collectif. Lorsqu'elle agit, personne de ceux qui la composent n'est nommé. Mais, dans le cas actuel, le bref est adressé à des individus nommés, qui répondent chacun pour eux personnellement et qui peuvent être exposés à être emprisonnés. Chacun des défendeurs a donc son intérêt particulier dans la cause, indépendamment de l'intérêt des autres, et a droit de soutenir seul cet intérêt. Dans le cas même où le bref est adressé à une corporation, il peut y avoir différents rapports et des réponses différentes peuvent être faites. Tapping, *On Mandamus*, p. 343. Quant au mérite de la cause, la requête libellée est bien fondée, et les conclusions doivent être accordées. Le demandeur a étudié non-seulement trois années, ce qu'il était obligé de faire pour aspirer à l'admission à la pratique, mais encore il a étudié quatre années, ce qui ne présente rien d'illégal, mais, au contraire, offre une garantie additionnelle sur ses qualifications. Les conclusions de la requête libellée sont accordées, mais sans frais contre les défendeurs, vu qu'ils sont officiers publics, et comme tels sont justifiables d'agir strictement dans l'exécution de leurs devoirs.

"La Cour, attendu que le demandeur allègue, par sa déclaration ou requête libellée, les faits suivants: 1° Qu'il a été admis à l'étude de la profession d'avocat, par le Barreau du Bas-Canada, section du district de Montréal, le premier mai 1865: 2° Que le deux du même mois de mai, même année, Jacques-Olivier Bureau, son père, a consenti, devant Jobin et son confrère, notaires, un brevet, pour lui, demandeur, encore mineur, par lequel il l'a engagé comme clerc à Venceslas-Paul-Wilfrid Dorion, avocat de la cité de Montréal, pour l'espace de trois années, à compter de sa date, et que ce brevet a été enregistré au registre tenu à cette fin, par le secrétaire de cette section, le douze du même mois: 3° Que le trente et un d'août 1867, il a obtenu un certificat d'étude et diplôme de licence, sous le

sceau de la corporation du collège Sainte-Marie, signé du recteur de ce collége et d'un professeur, après avoir suivi les cours de droit dans ce même collége et subi les examens requis : 4° Qu'il a servi comme tel clerc sous Venceslas-Paul-Wilfrid Dorion depuis le deux mai 1865 jusqu'au deux mai 1868 ; et qu'alors l'engagement ou brevet a été continué par l'effet de la loi et du consentement des parties, pour tout le temps qu'il ferait courir sa cléricature, c'est-à-dire jusqu'à l'époque où il se ferait admettre à la profession : 5° Qu'il a obtenu un certificat d'étude comme tel clerc et étudiant de Venceslas-Paul-Wilfrid Dorion, depuis le deux mai 1865 jusqu'au quinze juin 1868, tel que constaté par un certificat d'étude du Barreau du Bas-Canada, section du district de Montréal, donné par le bâtonnier et contresigné par le secrétaire, sous le sceau de cette section, en date du vingt-six avril dernier : 6° Que le vingt et un septembre 1868, par acte passé devant Normand, notaire, Venceslas-Paul-Wilfrid Dorion a transporté à Joseph-Napoléon Bureau, avocat de la cité de Trois-Rivières et pratiquant dans ce district, le brevet de cléricature du demandeur, pour le temps qui restait pour parachever son terme, et que lui, demandeur, alors majeur, est intervenu au transport, y a consenti et s'est obligé de servir comme clerc sous Joseph-Napoléon Bureau, pour tout le temps à courir jusqu'à l'admission du demandeur à la profession d'avocat : 7° Qu'il a obtenu un certificat d'étude de Joseph-Napoléon Bureau depuis le vingt et un septembre 1868 jusqu'au trois mai dernier : 8° Qu'il a atteint l'âge de vingt et un ans révolus le seize mars 1866 : 9° Qu'il a donné au secrétaire du Barreau du Bas-Canada, section du district de Trois-Rivières, le premier avril dernier, l'avis requis par l'acte concernant le Barreau du Bas-Canada, qu'il avait l'intention de se présenter le trois mai dernier, jour fixé pour la séance du comité d'examinateurs pour la section, afin d'être admis à la pratique de la profession d'avocat, étant plus d'un mois avant l'assemblée des examinateurs ; et que cet avis a été affiché dans la chambre des avocats au Palais de Justice, en la cité de Trois-Rivières, depuis le premier avril jusqu'au trois mai dernier : 10° Que le trois mai dernier, il a déposé entre les mains du secrétaire, les documents nécessaires et requis par la loi pour constater la régularité de sa cléricature et de ses études, et payé au trésorier de la section la somme de quatorze piastres comme aspirant à la profession d'avocat : 11° Que, le même jour, trois mai dernier, il s'est présenté à l'assemblée des examinateurs, composée des cinq défendeurs, afin de subir son examen pour être admis à la profession d'avocat, mais que la majorité des examinateurs a refusé de l'examiner sur ses connaissances et ses qualifications,

et, en conséquence, il n'a pas pu subir d'examen. Et, par les conclusions de sa déclaration ou requête libellée, il conclut: 1° à l'émanation d'un bref de *mandamus* adressé aux défendeurs, pour leur enjoindre de l'examiner sur ses connaissances légales et qualifications pour la pratique de la profession d'avocat, afin qu'il puisse obtenir, s'il est jugé capable et qualifié, un diplôme d'admission à cette profession, ou de donner leurs raisons à l'encontre; 2° à ce qu'il soit déclaré que la déclaration ou requête libellée est bien fondée, et qu'il soit enjoint aux défendeurs de procéder à faire subir un tel examen, et 3° à ce qu'il émane un bref de *mandamus* péremptoire, enjoignant aux défendeurs de l'examiner sur ses connaissances et qualifications, et qu'à défaut par eux de s'y conformer, ils y soient contraints par corps ou à l'amende. Attendu que Charles-Borromée Genest plaide 1° par une exception péremptoire à la forme par laquelle il plaide en substance: 1° que les examens étant fixés par la loi et les règlements de la section du district des Trois-Rivières, aux premiers lundis de janvier et juillet de chaque année, le bref de *mandamus* est nul, parce qu'il enjoint de faire une chose impossible, savoir: d'examiner le demandeur avant le premier lundi de juillet, le demandeur omettant même de faire voir, par sa déclaration ou requête libellée, quand et où, il pourra être examiné avant le premier lundi de juillet; 2° que le bref de *mandamus* ne pouvait émaner, comme il l'a été, contre les défendeurs, mais seulement contre le Barreau du Bas-Canada, section du district des Trois-Rivières; 3° que les affidavits sur lesquels le bref est émané, sont insuffisants, l'un ne faisant qu'émettre une opinion légale sur la suffisance des documents produits à l'appui de la déclaration ou requête libellée, ne fait pas voir que le demandeur a réellement étudié comme clerc avocat dans la cité de Trois-Rivières. 2° Par une exception péremptoire par laquelle il allègue en substance: 1° qu'il résulte des brevet, certificat du bâtonnier de la section du district de Montréal, et diplôme du recteur du collège Sainte-Marie, mentionnés ci-dessus, en l'exception et en la déclaration ou requête libellée, que la cléricature du demandeur a été terminée à Montréal, dans la section du district de Montréal, sous le quinze juin 1868, et son brevet expiré le deux mai, même année, et que le transport de ce brevet à Joseph-Napoléon Bureau, le 21 sept. 1868, ne peut valoir au demandeur, parce qu'il est d'un brevet accompli pour une cléricature terminée; 2° que le demandeur ne produit pas, à l'appui de sa demande, d'autre brevet que celui susmentionné, et ne fait pas voir qu'il lui ait été enjoint, par aucun comité d'examinateurs de la section du district de Montréal, de continuer à étudier la profession d'avocat, après son premier brevet expiré et sa cléricature

terminée, seul fait qui eût pu lui permettre de se présenter devant la section du district des Trois-Rivières, avec un transport régulier, pour être admis à cette profession, après avoir étudié dans cette section pendant le temps voulu par la loi; et qu'en l'absence d'une telle preuve, il ne peut, sous aucune circonstance, dans l'état de sa présente demande, être admis à un examen dans la présente section, pour être admis à la pratique de la profession d'avocat; 3° que le demandeur n'a pas prouvé, à la satisfaction des défendeurs, qu'il eût étudié ainsi que requis par la loi, dans la section du district des Trois-Rivières, et qu'il n'a pas rempli les formalités exigées par la loi, pour mettre les défendeurs en état de l'examiner comme candidat à la pratique de la profession d'avocat: Attendu que le demandeur lie contestation par une réponse en droit et une réponse générale à chacun de ces plaidoyers, et que, par ces réponses en droit, qui toutes expriment la même chose, et sont dans les mêmes termes, il dit en substance: 1° que Genest, poursuivi conjointement avec les autres défendeurs, comme formant ensemble le comité d'examinateurs du barreau du Bas-Canada, section du district des Trois-Rivières, ne peut pas défendre en son seul nom; 2° que Genest n'allègue pas avoir mis les autres défendeurs en demeure de se joindre à lui pour défendre; 3° que les défendeurs ne peuvent se séparer pour produire chacun une défense, mais que la défense doit être faite par tous les membres, ou du moins par la majorité, après avoir mis les autres en demeure de se joindre à eux, et 4° enfin, qu'il n'appert pas que les défenses produites expriment l'opinion et la volonté du comité des examinateurs ou de la majorité de ce comité: Attendu que Cressé et Joseph-Napoléon Bureau, deux des défendeurs, ont répondu en demandant acte, par motion présentée à cette cour le douze juin dernier, de leur déclaration qu'ils avaient toujours été, et étaient encore prêts à faire subir au demandeur, l'examen requis pour le faire admettre à la profession d'avocat, procureur et conseil: Attendu que Malhiot et Bourdages, les deux autres défendeurs, ont comparu, mais n'ont pas comparu ni plaidé à la déclaration ou requête libellée: Considérant, sur l'exception péremptoire à la forme: 1° Que cette cour a le pouvoir d'ordonner l'examen demandé à aucun jour quelconque, parce qu'il n'a pas été fait, comme il aurait dû l'être, au jour fixé par la loi ou les règlements de la corporation du Barreau du Bas-Canada, section du district des Trois-Rivières, et qu'il s'agit de réparer une erreur ou omission dont le demandeur ne doit pas souffrir, puisque la faute ne vient pas de lui, mais bien de la majorité du comité des examinateurs; 2° que le bref de *mandamus* est bien dirigé, parce que, par la loi, c'était aux défendeurs à faire ce que ce bref exige d'eux, et non à ladite

section qui n'a pas le pouvoir d'examiner les aspirants à l'étude et à la profession d'avocat, mais seulement de nommer, pour le faire, un ou des comités d'examinateurs sur lesquels elle ne peut exercer aucun contrôle par appel ou autrement; 3° que les affidavits sur lesquels le bref est émané, suffisaient pour l'accorder et qu'ainsi cette exception péremptoire à la forme est mal fondée: Considérant sur les réponses en droit aux plaidoyers de Genest: 1° Que le bref de *mandamus* est émané, non contre une corporation portant un nom qui lui est propre, mais bien contre certains officiers d'une corporation, chargés d'accomplir un devoir que la charte d'incorporation leur impose; de sorte que le bref devait leur être adressé sous leurs noms respectifs; 2° que ceux de ces officiers, formant la majorité du comité d'examinateurs, qui refuseraient d'obéir à un bref de *mandamus* péremptoire, pourraient être emprisonnés, suivant l'acte des Statuts Refondus du Bas-Canada, chapitre 88, section 13, tandis que ceux qui se mettraient en devoir d'y obéir, seraient exempts d'emprisonnement; qu'ainsi chacun des défendeurs est obligé personnellement, et a intérêt de répondre pour lui-même, sans le concours des autres, et même sans être obligé de les requérir de le faire ainsi, ou de se joindre à lui; d'où il suit que Genest a droit de plaider seul, comme il l'a fait, à la déclaration ou requête libellée, et qu'en conséquence les trois réponses en droit du demandeur sont mal fondées: Considérant, au mérite du bref de *mandamus* et de la déclaration ou requête libellée: 1° que le demandeur a prouvé les faits énoncés en sa déclaration ou requête libellée et ci-dessus rapportés, et même qu'il a, en outre, étudié comme clerc de Venceslas-Paul-Wilfrid Dorion, sous brevet passé devant notaire, régulièrement et sans interruption, depuis le 15 juin jusqu'au vingt-cinq septembre 1868, aux termes du certificat de Venceslas-Paul-Wilfrid Dorion, comme il appert au certificat donné le vingt-trois mai dernier, par le bâtonnier du Barreau du Bas-Canada, section du district de Montréal, sous son seing, le sceau de ladite section et le contre-seing du secrétaire de la même section; qu'ainsi il est établi que le demandeur a étudié régulièrement et sans interruption, comme clerc avocat et étudiant en droit, sous brevet et transport de brevet notariés, l'espace de quatre années consécutives, depuis le deux mai 1865 jusqu'au trois mai 1869, et dont les derniers six mois dans la section du district des Trois-Rivières; 2° que le fait d'avoir terminé ses trois années d'étude et même plus sous Venceslas-Paul-Wilfrid Dorion, dans la section du district de Montréal, n'empêchait pas le demandeur de continuer valablement ses études de droit, dans la section du district des Trois-Rivières, sous un transport du même brevet, et qu'en étudiant pendant quatre années, au lieu de trois comme il en

avait le droit d'après son brevet avec Dorion et le diplôme de licence qu'il a obtenu du collège Sainte-Marie, le demandeur donne à la profession à laquelle il aspire et au public, une garantie additionnelle de ses capacité et suffisance pour exercer cette profession ; qu'ainsi, l'exception péremptoire de Genest est mal fondée, et lesdits bref de *mandamus* et déclaration ou requête libellée bien fondés : Déboute 1° ledit Genest de son exception péremptoire, sans dépens, et 2° le demandeur de ses réponses en droit aux trois plaidoyers de Genest, aussi sans dépens ; et ordonne qu'il émane de cette cour un bref de *mandamus* péremptoire, adressé aux défendeurs, leur ordonnant péremptoirement d'examiner le demandeur sur ses connaissances et qualifications pour être admis à la pratique de la profession d'avocat dans la province de Québec, lesquels défendeurs feront connaître, à cette cour, comment ils ont exécuté ledit bref de *mandamus* péremptoire, mercredi, le vingt-huit juillet courant, auquel jour icelui bref sera rapporté devant cette cour ; le tout sans dépens." (1 *R. L.*, p. 674)

W. McDougall, avocat, Jonathan-C. Wurtele, conseil, pour le demandeur.

C.-B. Genest, pour le défendeur Genest.

ACTION QUI TAM.—ACTE MUNICIPAL.

Cour Supérieure, Trois-Rivières, 15 avril 1870.

Coram Polette, J.

Benjamin Lami *vs* André Rabouin.

Jugé : 1° Que le poursuivant *qui tam*, qui réclame une amende pour contravention à l'Acte concernant les municipalités, ch. 24 S. R. B. C., en vertu de la sect. 63, § 8, doit poursuivre tant en son nom qu'en celui de la municipalité.

2° Que toute personne a le droit d'intenter une telle action *qui tam* sans être tenue d'avoir l'autorisation préalable de la municipalité.

3° Qu'un défendeur à une action *qui tam* ne peut pas être entendu comme témoin contre lui-même, et que, s'il l'est, son témoignage sera mis de côté et la Cour n'y aura aucun égard.

4° Qu'un rapport fait par un surintendant spécial nommé pour régler des travaux, dans les termes suivants : "*qu'il ne se croit pas en droit* "*de faire aucune ordonnance à ce sujet*", doit être considéré comme un refus d'agir de sa part, vu qu'il ne se conforme pas aux prescriptions de la section 45 de l'Acte concernant les municipalités, ch. 24 S. R. B. C., qui ordonne au surintendant l'alternative, ou d'agir et de faire un procès-verbal, s'il y a lieu, ou de refuser les travaux demandés et, dans ce cas, donner les motifs de son refus.

5° Que l'homologation par le conseil local d'un rapport fait dans les termes ci-dessus mentionnés, n'est d'aucune valeur quelconque et ne peut pas donner droit à un appel au conseil de comté.

6° Que les pouvoirs du conseil de comté, comme du conseil local, se

bornent à rejeter, confirmer ou amender un procès-verbal fait par un surintendant spécial; par l'Acte concernant les municipalités, les conseils municipaux n'ont pas le droit de prendre l'initiative et de dresser un procès-verbal au refus du surintendant d'en faire un.

Le juge POLETTE: La dénonciation et poursuite est faite contre le défendeur comme inspecteur des chemins, pour avoir négligé et refusé de faire mettre à exécution un procès-verbal de route. Le poursuivant, qui poursuit en son seul nom, conclut à une condamnation de $32 d'amende, à raison de $2 par jour, depuis le 2 jusqu'au 19 novembre dernier, suivant l'Acte concernant les municipalités, S. R. B.C., chap. 24, sect. 62, § 6. La sect. 63, § 8, statue que la moitié des amendes appartiendra à la municipalité, et l'autre moitié au poursuivant, à moins que la poursuite n'ait été intentée par l'ordre d'un conseil municipal, ou par l'un de ses officiers, auquel cas la totalité de l'amende appartiendra à cette municipalité. Le poursuivant n'allègue pas, et ne prouve pas que la poursuite actuelle ait été faite par l'ordre du conseil municipal de Saint-Léon, ni qu'il soit l'un des officiers de cette municipalité; de sorte que, si le défendeur est condamné à l'amende, une moitié appartiendra à la municipalité et l'autre moitié au poursuivant. 1° Le défendeur plaide (par défense en droit) que le poursuivant n'ayant que la moitié de l'amende, devait poursuivre tant en son nom qu'en celui de la municipalité, à qui doit aller l'autre moitié; que l'action est *qui tam* et qu'il n'a pu légalement poursuivre en son seul nom, comme il l'a fait. Ce moyen de défense est sérieux, comme on pourra s'en convaincre par les citations suivantes: "As to the first point, viz. In what cases "an information or action *qui tam* will lie. Sec. 17.—I take "it for granted, that they lie on no statute which prohibits a "thing as being an immediate offence against the public good "in general, under a certain penalty, unless the whole or part "of such penalty be expressly given to him who will sue for "it; because otherwise it goes to the king, and nothing can "be demanded by the party. But where such statute gives "any part of such penalty to him who will sue for it, 'by "action or information, &c.' I take it to be settled at this "day, that any one may bring such action or information "and lay his demand *tam pro domino rege quam pro* "*seipso*" (2 Hawkins, Pleas of the Crown, book 2, ch. 25, sect. 17, pages 368 and 369).— "The same reason, &c. But more "usually, these forfeitures created by statute are given at "large to any common informer; or, in other words, to "any such person or persons as will sue for the same: and "hence such actions are called *popular* actions, because "they are given to the people in general. Sometimes one "part is given to the king, to the poor, or to some public

" use, and the other part to the informer or prosecutor: and " then the suit is called a *qui tam* action, because it is brought " by a person, *qui tam pro domino rege, &c., quam pro seipso* " *in hac parte sequitur*" (3 Blackstone, ch. 9, pp. 160, 161). " But an information or action *qui tam* will not lie on " any statute which prohibits a thing as being an immediate " offence, &c., &c. But where such statute gives any part of " such penalty to him who will sue for it by action or infor- " mation, any one may bring such action or information, and " lay his demand, *as well for our lord the King as for him-* " *self*" (3 Burn's Justice, v° Information, § 4, page 682, edition 1788). "*Qui tam*, is when an information is exhi- " bited against any person on a penal statute; *at suit of the* " *king* and the party who is informer, where the penalty for " breach of the statute is to be divided between them; and " the party informer prosecutes *for the king* and himself" (Jacob's Law Dictionary, v° *qui tam*). " Actions popular, given " on the breach of some penal statute, which every man hath " a right to sue for himself and the king by information, " action, &c. And because this action is not given to one " especially, but generally to any that will prosecute, it is " called action popular, and from the words used in the pro- " cess (*qui tam pro domino rege sequitur quam pro seipso*, " who sues as well for the king as for himself) it is called a " *qui tam* action" (1 Tomlins, Law Dictionary, v° action [action popular]. "*Proceedings in* (penal action). The process " is by writ of summons and distringas, unless the statute " giving the penalty allow the defendant to be holden to bail, " and then by writ of *capias*. These writs are in the ordinary " form, except that after the words "at the suit of" (the " Plaintiff) you add "who sues as well for our Lady the " Queen as for himself in this behalf," or as the case may be" (2 Archibold's New Practice of Attornies, ch. 3, p. 187, edition 1844). Chitty's Forms, p. 81, book 3, ch. 5, sect. 3, *qui tam*, edition 1862. Saunder's practice of Magistrates Courts, p. 26, edition 1869. Il y a donc une omission fatale dans les déclaration et bref, en ce que le poursuivant ne poursuit pas, tant en son nom qu'en celui de la municipalité. Il a été dit que le poursuivant ne pouvait pas poursuivre en son nom et en celui de la corporation, sans y être spécialement autorisé par le conseil. C'est une erreur; toute personne est autorisée à poursuivre ainsi: 1° par la sect. 63, § 8 de l'Acte concernant les municipalités, qui attribue moitié de la pénalité à la municipalité et l'autre moitié au poursuivant; 2° par la sect. 64, § 1, qui dit que: "Toute personne majeure a et aura le droit d'inten- " ter toute poursuite autorisée par les dispositions de cet " acte." Stone's practice of petty session, by Bell and Cane,

p. 110 of the supplement; *addentade* page 63, édition 1863. D'ailleurs la poursuite ne peut qu'être avantageuse à la municipalité en recevant sa part de la pénalité, si le défendeur est condamné à en payer, tandis que, si le poursuivant ne réussit pas, la municipalité n'aura ni frais ni autre chose à payer. 2° Le prétendu procès-verbal sur lequel la poursuite est faite, est du 8 octobre dernier; il a été publié le 16 du même mois; il en aurait été remis une copie au défendeur, si le fait est prouvé, le 2 novembre suivant, et l'action ou poursuite est intentée le 19 de ce mois de novembre; de sorte qu'il ne s'est écoulé qu'un mois et trois jours entre la publication et l'action. Le demandeur devait établir que, dans ce court intervalle, le défendeur avait été mis en possession de ce procès-verbal assez à temps pour le faire mettre à exécution, avant qu'on ne le poursuivît. Antoine Lesage et Fidèle Laferrière ont entendu lire le procès-verbal du 8 octobre dernier; ils ont *compris* que c'était ce procès-verbal qu'on leur a lu, mais ils ne savent pas assez lire pour le lire. Le défendeur a eu copie de ce procès-verbal le 2 nov. Telle est la preuve de la remise du procès-verbal au défendeur par deux hommes qui ont vu remettre un papier, qui leur a été lu, et qu'ils ont compris être le procès-verbal dont est question. Ceci n'est rien de certain, et l'on ne peut pas dire avec certitude que le défendeur ait eu ce document. Le défendeur a été entendu comme témoin *de bene esse*, pour prouver que les deux premiers témoins lui avaient apporté le procès-verbal du 8 octobre; mais ce témoignage doit être mis de côté, comme ayant été rendu illégalement; l'action est pénable et nous suivons les dispositions du droit anglais quand celui établi par nos Statuts n'a pas parlé. Or, par le droit anglais, celui qui est poursuivi pour une pénalité ne peut pas plus être examiné comme témoin, que s'il l'était par indictement, et notre droit ne contient pas de disposition contraire; ainsi pas de preuve de la remise du procès-verbal au défendeur. 3° L'Acte concernant les municipalités, sect. 45, statue: que lorsqu'il est présenté requête à un conseil, ou lorsqu'il a été passé une résolution par un conseil pour l'ouverture d'un chemin, le conseil nommera de suite un surintendant spécial pour faire rapport sur telle requête. Le § 3 de la même section veut que si le surintendant spécial considère que tel ouvrage ne doit pas être fait, il fera un rapport spécifiant les motifs de son opinion; mais s'il est d'avis que l'ouvrage doit être fait, il dressera un procès-verbal ou rapport en conséquence. Le 31 juillet dernier, le conseil de Saint-Léon nomme, par résolution, Norbert Lambert pour faire droit sur la requête servant de base au procès-verbal dont il a été parlé. Le 30 août suivant, le surintendant, s'adressant au maire et aux conseillers, déclare qu'il fait rapport au conseil:

qu'il ne se croit pas en droit de faire aucune ordonnance à ce sujet. Au lieu donc d'accueillir la requête et de faire un procès-verbal, s'il croyait que l'ouvrage dût être fait, ou de ne pas l'accueillir s'il était d'avis que l'ouvrage ne dût pas se faire et de donner les motifs de son opinion, il fait rapport qu'il ne croit pas avoir le droit de faire aucune ordonnance, ou, en d'autres termes, qu'il ne veut pas agir, car ce rapport n'est certainement pas un de ceux que la loi lui dictait de faire. D'un côté, il ne dit pas que l'ouvrage demandé ne doit pas être fait et il ne donne pas les motifs d'une telle opinion, et de l'autre, il ne fait pas voir que l'ouvrage doit être fait et ne fait pas de procès-verbal, en conséquence; de sorte qu'il ne se conforme pas à l'une ou l'autre de ces alternatives que la loi lui donnait; la seule chose que contienne le rapport, c'est un refus d'agir, car déclarer qu'il ne se croit pas en droit de faire aucune ordonnance à ce sujet, ne dit pas et ne peut pas dire autre chose. Avec un tel rapport devant les yeux, le conseil n'avait qu'une seule chose à faire; c'était de nommer un autre surintendant qui consentit à agir, car les requérants avaient droit d'exiger qu'on se prononçât pour ou contre leur requête. La sect. 45, §§ 1 et 3, de l'acte précité est impérative là-dessus; mais loin d'adopter ce procédé, il passe une résolution le 7 septembre, homologuant le rapport du surintendant, c'est-à-dire n'homologuant rien, car ce rapport ne contient rien, excepté un refus d'agir. Appel est interjeté au conseil de comté du rapport du surintendant Lambert, et, le 8 octobre dernier, ce conseil passe une résolution, que le rapport de Lambert et la décision du conseil de Saint-Léon l'homologuant soient amendés, et que le procès-verbal de Brunelle, du 1er mai 1868, soit rappelé et annulé. Cette même résolution contient un procès-verbal ou règlement de route, suivant la requête qui le demandait au conseil de Saint-Léon. Si le rapport fait par Lambert au conseil de Saint-Léon n'en est pas un contre la requête, ni un procès-verbal ou rapport en faveur de cette requête; que ce ne soit rien enfin, et que la résolution du conseil de Saint-Léon du 7 septembre par laquelle il est prétendu que ce rapport est confirmé, n'homologue rien, ainsi que la Cour croit l'avoir démontré, il s'ensuit nécessairement qu'il ne pouvait pas y avoir d'appel, au conseil de comté, de ce qui n'existait pas et que ce dernier conseil n'a pas pu amender un papier qui n'est pas un rapport ni un procès-verbal, dans le sens de la sect. 45, § 3. La résolution du conseil de comté du 8 octobre contient, non pas la confirmation, l'amendement ou le rejet d'un procès-verbal, au désir de la sect. 66, §§ 1 et 2, mais un véritable procès-verbal de route qu'il fait lui-même, du commencement à la fin, pour une municipalité locale, sans que l'initiative en ait été prise par le conseil local et un surinten-

dant spécial, comme le prescrit la section 45. Le conseil de comté ne pouvait pas faire un tel acte de lui-même: il lui fallait, pour avoir le pouvoir d'agir, le trouver fait par le surintendant et le conseil local, sauf à lui à le confirmer, l'amender ou le rejeter, mais il n'a rien trouvé de cela. Aux yeux de la Cour, le conseil de comté a assumé un pouvoir que la loi ne lui donnait pas et son prétendu procès-verbal doit être traité comme s'il n'existait pas. Jugement renvoyant l'action, avec dépens. (1 *R. L.*, p. 687)

McDOUGALL et HOULISTON, avocats du demandeur.

C.-B. GENEST, avocat du défendeur.

PRESCRIPTION.

COURT OF QUEEN'S BENCH, Montreal, 10th September, 1870.

Coram DUVAL, C. J., CARON, J., DRUMMOND, J.,

BADGLEY, J., BEAUDRY, J. *ad hoc.*

KAIGLE, appellant, *and* PIERCE, respondent.

Held: That the knowledge by a donee of the existence of a *hypothèque* on the property acquired at the time of his acquisition does not constitute him in bad faith, and he can therefore invoke the prescription of ten years.

2° That in the present case the payment made by the purchaser, for the vendor and with the money of the latter; in part extinction of the *hypothèque*, did not interrupt the prescription.

This was an appeal from a judgment rendered by the Circuit Court, for the district of Iberville, on the 11th day of June, 1867, condemning appellant to pay to respondent the sum of $101.40, and interest and costs, which judgment was confirmed by the Superior Court, at Montreal, sitting as a Court of Review, on the 30th of May, 1868. (The Hon. Mr Justice MONDELET *dissenting*) The action was brought by Pierce, as the *cessionnaire* of Henry Sherry, under transfer executed 22nd May, 1865, to recover from appellant $101.40, balance due under deed of sale from Henry Sherry to appellant, of certain real estate, described in the deed executed 22nd April, 1864. The appellant pleaded that Henry Sherry guaranteed the property sold to be free and clear, *franc et quitte*, of all mortgages; that there subsisted on the property, at the time of the institution of the action, a *bailleur de fonds* claim of £90 9 1, besides interest, remaining due and unpaid, under a deed of sale of the property in question, from Eustache Soupras to Samuel Sherry, father of Hen-

ry Sherry, executed on the 16th of May, 1846, and registered on the 3rd of June, 1846; that Henry Sherry acquired said property from Samuel Sherry, his father, by donation executed on the 28th day of January, 1850; that Henry Sherry paid $100 on account of said *bailleur de fonds* mortgage, on or about the 2nd of July, 1858, to Bessette, then acting as agent to the estate of said Soupras; that Edward McDonald purchased and acquired said *bailleur de fonds* mortgage, on the 14th of July, 1865, and threatened appellant with an hypothecary action; that, in consequence, defendant tendered to plaintiff his said claim and costs before the return of the action. The tender was reiterated with plea, and the prayer of the plea was to the effect that respondent be condemned to cause the *bailleur de fonds* claim to be discharged, or to give good and sufficient security to appellant that he will never be troubled by reason thereof. The respondent replied to the effect that the mortgage complained of had long since been prescribed, and that no real cause of *trouble* existed. In this pleading, the prescription is claimed on the ground that appellant and his *auteur*, Henry Sherry, had been "*en possession dudit immeuble sans trouble depuis plus de dix ans, savoir quinze ans,*" before the execution of the deed of transfer to McDonald. And stress was laid on the fact that, in the deed of donation, the property was declared to be free and clear of all claims whatsoever. At *enquête*, it was proved that Henry Sherry paid Bessette (as agent for the Soupras estate) on the 2nd July, 1858, the sum of $100 on account of the *bailleur de fonds* claim in question, and that he (Sherry) had full knowledge of the existence of this claim when he acquired the property from his father. And Henry Sherry himself established the same facts, stating, however, that he received the money he so paid from his father, and that he paid it "like agent for" his father.

The following was the judgment of the Circuit Court, which was rendered by Mr Justice SICOTTE:

"La cour, considérant que les allégués de la défense, comme les faits établis par les papiers produits, constatent que le défendeur possède, et possédait, lors de l'action, tant par lui-même que par son auteur, depuis plus de dix ans, sans inquiétation, l'héritage dont le prix de vente est réclamé pour partie seulement; considérant que, d'après la preuve et la loi, le défendeur avait acquis, longtemps avant l'action, la prescription de l'hypothèque qu'il indique, et qu'il ne peut être évincé; considérant que le défendeur ne justifie pas de justes raisons de craindre d'être troublé dans la possession de l'héritage qu'il a acquis, ainsi que relaté dans les écritures, et dont le prix est réclamé pour partie; considérant que le demandeur

est bien fondé à réclamer, comme il le fait; déclare le défendeur mal fondé dans ses défenses, et condamne le défendeur à payer au demandeur la somme de $101.40 avec intérêt du 25 janvier 1866, sur la somme de $100."

The appellant, feeling himself aggrieved by this judgment, inscribed the case for hearing before the Superior Court, at Montreal, sitting as a Court of Review. The majority of that court, composed of Justices BERTHELOT and MONK (Mr Justice MONDELET *dissenting*), confirmed the judgment of the Circuit Court on the 30th May, 1868. Here follow the remarks of Judges MONDELET and BERTHELOT in Review:

MONDELET, J.: Les questions qui s'élèvent en cette cause sont: 1° Admettant que Henry Sherry connaissait l'hypothèque pour balance du prix de vente par son auteur de l'immeuble en question, cette connaissance le constituait-elle en mauvaise foi, et empêchait-elle la prescription de courir? 2° Le paiement de $100 interrompait-il la prescription, et la preuve orale était-elle admissible pour établir ce paiement? 3° Le défendeur montre-t-il une cause raisonnable de craindre d'être troublé, et, en conséquence, est-il justifiable de retenir entre ses mains son prix de vente? Pour la 1re question, je suis d'avis que la connaissance que Henry Sherry avait de l'existence de la dette hypothécaire due par son auteur, le constituait en mauvaise foi et l'empêchait de prescrire. Sur la 2nde question, je crois que le paiement de $100 à l'agent de la succession Soupras a eu l'effet d'interrompre la prescription, et que la preuve orale du fait de ce paiement n'est pas, vu les circonstances de la cause, inadmissible, en autant qu'on ne prouve pas ce paiement dans le but d'établir la décharge de la dette, mais seulement dans celui d'établir qu'un acte a été, tel jour, fait par tel individu, lequel acte a l'effet d'interrompre la prescription. Quant à la question de savoir si le défendeur a de justes raisons de craindre d'être inquiété au sujet de cette hypothèque, il n'y a pas à en douter, lorsqu'on considère qu'en dépit de la clause de garantie et de "franc et quitte," il existe une réclamation privilégiée, dûment enregistrée, que le demandeur est tenu de faire disparaître. La défense, au lieu d'être rejetée, aurait donc dû être maintenue, et jugement aurait dû être rendu en conséquence; mais je regrette de dire que mon avis n'est pas partagé par mes honorables collègues, et il ne me reste qu'à faire enregistrer mon dissentiment sur le jugement qui va être prononcé par cette cour.

Le juge BERTHELOT: Il y a une grande différence entre la bonne foi à l'effet d'acquérir un immeuble, et celle à l'effet de se libérer d'une dette. Cette différence est bien exposée par Duranton, 21 vol., n° 384 et suivants. Lorsque, pour acquérir par prescription, la bonne foi est requise, il faut que le posses-

seur se croit le propriétaire, et ignore qu'un autre est le propriétaire de l'immeuble qu'il détient; la connaissance qu'il aurait des droits d'un tiers à cette propriété arrêterait la prescription, parce qu'il cesserait d'être de bonne foi. Mais, lorsqu'il s'agit de se libérer, la bonne foi ne peut plus être requise, parce que la loi établit alors la prescription pour mettre fin aux contestations, et présume le paiement. Ainsi, dans le cas actuel, le fait que Sherry fils, lorsqu'il a acquis de son père, savait que celui-ci devait une partie de son prix d'achat, ne pouvait nuire à la prescription contre l'hypothèque qui y était attachée, parce qu'il a acquis l'immeuble libre de toute charge, et il pouvait espérer que son père paierait cette dette. Je dois ajouter que le transport à McDonald de la créance hypothécaire n'est pas prouvé, car ce transport est fait par Davignon de Longueuil, qui se dit représenter toute la succession Soupras, mais aucune preuve n'a été produite des pouvoirs de Davignon. Quand au fait du paiement, il ne pouvait interrompre la prescription, parce qu'il n'a pas eu lieu par Sherry fils, mais par Sherry père. En conséquence, le jugement de la Cour de Circuit de Saint-Jean est confirmé, avec dépens.

BETHUNE, Q. C., for appellant, submitted that the opinion of Mr. justice MONDELET was correct, for the following reasons: In the language of the 114th article of the Custom of Paris, the possession of the party invoking the prescription must be *de bonne foi et sans inquiétation.* The knowledge, by Henry Sherry, of the existence of the mortgage, at the time he acquired the property, rendered him a possessor *de mauvaise foi. Vide* 2 vol. Grande Cout., p. 382, n°s 6 et 7; Pothier, vol. 9, édition Bugnet, Pres., n°s 126, 127, 128; Troplong, vol. 2, Pres., n° 931; Dunod, Pres., p. 38; 2nd Bourjon, tit. 7, part. 5, ch. 1, sec. 2, art. 6, p. 653; 1 Duplessis, liv. 1, ch 2, p. 490, note (*c*); Guyot, Rep., v° Pres., p. 315; Bousquet, Dict. des Pres., p. 349; 11 Marcadé (2 Paul Pont, Hyp.), p. 535, n° 1250; 2 Troplong, Hyp. (Belgian Ed. in adv. lib.) n°s 880, 881 and 882 and notes; 9 Dalloz, Jur. du Roy., p. 423. And the payment by him on the 2nd of July, 1858, had the effect also of interrupting the prescription, even if he should be held to have been possessing in good faith. Dunod, Pres., p. 95: "*Si le débiteur reconnaît la dette, par quelque acte que ce soit; s'il paie une partie du capital, etc.,*" "*toutes les fois qu'il se fait quelque chose entre le créancier et le débiteur, le possesseur et le propriétaire, qui emporte un aveu exprès ou tacite de la dette, ce sera une interruption civile conventionnelle, qui empêchera le cours de la prescription.*" 2 *Troplong*, Pres, n° 612, p. 131: "*Indépendamment de la citation en justice, etc., il est un autre mode d'interruption civile, etc. C'est la reconnaissance de la dette ou du droit rival par le débiteur ou le possesseur.*" N° 618, p. 133: "*La recon-*

naissance peut être tacite. Nous signalons comme reconnaissance tacite le paiement des intérêts, etc. Pothier, vol. 4, oblgns., pp. 591 et suiv. Art. 2227 of Code Civil of L. C.: "Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by *any acknowledgment* which the *possessor* or the debtor *makes of the right of the person against whom the prescription runs.*" As to the right of appellant to prove the fact of the interruption by parol evidence. *Vide* 4 An. Den., v° Rentes Foncières, p. 245, n° 19; Dunod, Pres., pp. 171, 172; Troplong, Pres. (Belgian Ed. in Lib.), p. 540; Sirey, 1813, 2 pt., p. 65; Jour. du P., 1814, p. 453; Sirey, 1820, pt. 1, p. 325; Dalloz, 1832, pt. 1, p. 330; Civil Code of L. C., art. 1223, § 6. The respondent, moreover, is the mere *cessionnaire* of Sherry, and, therefore, possessed of no greater rights than Sherry. If Sherry were the plaintiff, clearly his *aveu* under oath, of having paid $100 on account, would be good evidence of the interruption. The respondent, consequently, as his *cessionnaire*, cannot legally object to proof by Sherry that the amount in question was actually paid by him. On the whole, appellant submits that he established, in a legal manner, (in the words of the statute,—Cons. Stat. of L. C., ch. 36, s. 31), that he "has just cause to fear that he will be troubled by an hypothecary action" on the part of McDonald, the present owner of the *bailleur de fonds* claim in question, and that he is therefore entitled to a reversal of both judgments, and to have judgment in terms of the conclusion of his plea.

JETTÉ, for respondent: Trois questions se présentent en cette cause: 1° La connaissance qu'avait Henry Sherry, qu'il était dû par son auteur une balance de prix de vente sur l'immeuble à lui transmis, *à titre singulier* et avec clause de *franc et quitte*, le constituait-elle en mauvaise foi et l'empêchait-elle de prescrire? 2° Le paiement fait par Henry Sherry, en 1858, *pour son père*, peut-il être considéré comme interruption de la prescription qui courait alors au profit du fils; et si oui, la preuve de ce paiement pouvait-elle être faite par témoins? 3° L'appelant a-t il fait voir une crainte de trouble suffisante pour le justifier de retenir le prix de l'immeuble entre ses mains? *Première question:* La connaissance qu'aurait pu avoir Henry Sherry qu'il était dû par son auteur une balance de prix de vente, sur l'immeuble à lui transmis, *à titre singulier* et avec clause de *franc et quitte*, le constituait-elle en *mauvaise foi* et l'empêchait-elle de prescrire? Tous les auteurs qui ont discuté et approfondi cette question y répondent négativement. La prescription invoquée par l'intimé, à l'encontre de l'hypothèque que lui oppose l'appelant, pour se justifier de retenir le prix de vente de l'immeuble entre ses mains, est établie par les articles 113 et 114 de la Coutume de Paris. Cette prescrip-

tion est à la fois *acquisitive* et *libérative*; et c'est sous ce double aspect qu'il importe de l'envisager pour en apprécier toute l'étendue. Elle est *acquisitive*, quant à la propriété même de l'immeuble, et *libérative* quant aux charges et hypothèques qui le grèvent. Or, ces deux prescriptions, *acquisitive* et *libérative*, ne sont pas regardées avec la même faveur en droit. Pour la prescription acquisitive on exige rigoureusement *le juste titre* et la *bonne foi*; pour la prescription *libérative* la négligence ou le silence du créancier, pendant le temps fixé, suffisent. Veut-on prescrire la propriété, il faut absolument la bonne foi, et la bonne foi la plus complète; il faut n'avoir aucun doute sur le droit de propriété de celui qui nous a vendu, car celui qui doute n'est pas de bonne foi, encore moins celui qui connaît le droit d'autrui à cette même propriété, cette connaissance l'empêche toujours de prescrire. Mais il n'en est pas ainsi lorsqu'il s'agit de se libérer; la libération est toujours favorable, et on l'acquiert, même dans les cas de courtes prescriptions, malgré la connaissance la moins équivoque du droit d'autrui, c'est-à-dire de la créance contre laquelle on prescrit. Ainsi, celui qui invoque la prescription d'un an, de cinq ans, de six ans contre une dette quelconque, connaissait certainement l'existence de cette dette pendant tout le temps de la prescription, et néanmoins il prescrit indubitablement. " Régulièrement, dit Merlin, vol. 24, *verbo* Prescription (Répertoire), page 135, pour se libérer par la voie de la prescription, il ne faut point de bonne foi." Tels sont les principes qui ont toujours prévalu, et aujourd'hui plus que jamais ces principes sont indéniables, car grâce à la faveur toujours croissante dont la prescription libérative a été l'objet dans toutes les législations, la loi a débarrassé cette prescription de toutes les entraves et les restrictions d'autrefois, et en la rendant *absolue* dans presque tous les cas, elle a prononcé l'extinction définitive de la dette comme punition de la négligence du créancier. Il n'est cependant pas nécessaire d'invoquer les idées nouvelles pour justifier la réponse que nous donnons à la question ci-dessus. Nous trouvons cette réponse en toutes lettres dans un arrêt du 18 mai 1684, rapporté au 2e volume du Journal du Palais, page 511. Rousseau de Lacombe, *verbo* Prescription, sec. 3, n° 1, p. 494 de la prescription de dix ou 20 ans: " Il faut *juste titre* et *bonne foi*, Paris 113 et 115; *juste titre*, s'entend d'un titre fait selon les lois, c'est-à-dire un contrat authentique et fait dans les formes prescrites pour les contrats entre personnes habiles à contracter, mais le contrat seul quoique revêtu de toutes les formalités ne suffirait pas à un acquéreur ou à un donataire, s'il n'était accompagné de *bonne foi*; il faut pour pouvoir user de la prescription de 10 et 20 ans, avoir cru que le vendeur ou donateur était propriétaire. Il est important

d'observer que ce texte de droit (cité précédemment par l'auteur) ne parle que des choses vendues ou données à *non domino*, et de la *prescription de la propriété ;* comme il paraît par ces termes, *cùm crederet eum dominum esse ; il ne parle point des simples hypothèques* qui ne dépouillent pas un débiteur, et n'empêchent pas qu'il ne soit maître et propriétaire ; *c'est pourquoi pour empêcher un acquéreur ou donataire de prescrire les hypothèques par* 10 *ou* 20 *ans, sa seule science ne suffit pas,* il faut une interruption formelle ; *c'est ainsi qu'il faut entendre Paris* 113 *et* 114." Troplong, *Vente*, vol. 2, n° 662, p. 134: " Après la renonciation expresse ou tacite, vient comme fin de non-recevoir la prescription de l'action en résolution. Entre le vendeur et l'acquéreur ou ses héritiers, l'action en résolution ne se prescrit que par 30 ans, et ces trente ans ne courent que du jour où le prix a été exigible. Mais les sous-acquéreurs qui réunissent la bonne foi au titre peuvent se prévaloir de la prescription de 10 et 20 ans. *La bonne foi existe quand même le tiers détenteur aurait su que le prix était dû ;* car il a pu légitimement penser que le vendeur originaire serait payé par son acquéreur direct." Duranton, tome 16, *Vente*, n° 364, p. 388 : " Le sous-acheteur peut opposer la prescription de 10 ans entre présents, et de 20 ans entre absents, à l'action en résolution, s'il a juste titre ; *et la connaissance qu'il aurait, au temps de la vente, que son vendeur doit encore tout ou partie du prix, ne le constituerait pas en mauvaise foi, à l'effet de l'empêcher d'invoquer cette espèce de prescription ;* car il a dû raisonnablement croire que son vendeur paierait son prix." Grenier, *Hypothèques*, tome 2, n°s 514 et 515, pp. 458 et 459 ; Delvincourt, tome 3, notes de la page 182, note 3, page 385 ; 2 Vazeille, *Prescription*, n° 514, p. 61 ; Battur, *Privilèges et Hypothèques*, tome 3, n° 772, p. 400 ; Bugnet, sur Pothier, *Prescription*, tome 9, page 363, note 2, fin du n° 127, du texte de Pothier ; 2 Persil, *Régime Hypothécaire*, sur art. 2180, n° 32, p.232. Enfin, la jurisprudence française moderne a aussi affirmé le principe consacré par l'arrêt de 1684, et la Cour Royale de Nîmes a jugé, le 19 février 1839, dans une cause de *Peythier* vs *Combe* et *Johanny*, Journal du Palais, an 1839 : " Que bien que l'acquéreur ait su, au moment de son acquisition, que son vendeur ne s'était pas libéré entre les mains du vendeur primitif, *cette circonstance ne le constitue pas de mauvaise foi.*" Enfin, le Code Civil du B. C., art. 2251, a une disposition conforme aux principes énoncés ci-dessus. Fort de ces autorités, l'intimé croit pouvoir conclure sur ce premier point, qu'Henry Sherry ayant possédé sans trouble, et avec juste titre et bonne foi, pendant plus de 14 ans, savoir depuis le 24 janvier 1850 jusqu'au 22 avril 1864, il avait, lorsqu'il a vendu à l'appelant, acquis la prescription contre toutes les hypothèques qui pou-

vaient grever l'immeuble à lui transmis. *Deuxième question* : Le paiement fait par Henry Sherry, en 1858, *pour son père*, peut-il être considéré comme interruption de la prescription qui courait alors au bénéfice du fils ; et si oui, la preuve de ce paiement pouvait-elle être faite par témoins ? La réponse à la première partie de cette question est tellement simple et concluante, qu'il serait oiseux de s'arrêter à discuter longuement la dernière partie, savoir si la preuve par témoins pouvait être permise dans l'espèce. Aussi ne le ferons-nous que parce que cette question a été soulevée par l'appelant en Cour de Revision, et que c'est sur ce point qu'un des Honorables Juges (M. le Juge MONDELET) a différé. La dette contre laquelle Henry Sherry prescrivait était celle de Samuel Sherry, son père, et non pas la sienne. Pour qu'un paiement considéré comme fait interruptif de prescription pût être opposé à Henry Sherry, il aurait fallu que ce paiement fût fait sur une dette due par lui, et non sur une dette due par un autre. Le paiement n'est une reconnaissance de la dette que de la part de celui qui doit ; et ici Henry Sherry ne devait rien. Ce paiement pourrait être valablement opposé à Samuel Sherry, mais il ne peut pas l'être à Henry Sherry. Qu'est-ce qu'Henry Sherry peut avoir reconnu en faisant ce paiement ? Une seule chose, il a reconnu que *son père devait* une balance de prix de vente ; a-t-il reconnu devoir, lui, cette balance de prix de vente ? Assurément non, et l'appelant n'a pas encore osé le prétendre. Le contrat d'Henry Sherry porte la clause de *franc et quitte* ; il est donc parfaitement libéré lui-même, le seul qui doive c'est son père Samuel Sherry ; le paiement de 1858 peut donc avoir eu pour effet d'interrompre la prescription qui courait alors au profit de Samuel Sherry sur son obligation personnelle de payer le prix de vente, mais non celle qui courait au profit d'Henry Sherry quant à la libération de l'immeuble par lui possédé. L'hypothèque créée par Samuel Sherry sur la terre d'Henry Sherry ne pourrait être dette de ce dernier que s'il y était obligé par son contrat d'acquisition ; or, c'est le contraire ; impossible donc de faire résulter de ce paiement une interruption de la prescription acquise à Henry Sherry. Il semble inutile de rien ajouter ; qu'importe maintenant qu'il ait été prouvé légalement ou non, qu'Henry a fait en 1858 un paiement de $100 avec l'argent de son père, pour le compte et sur la dette de ce dernier ? L'hypothèque n'en est pas moins prescrite au profit d'Henry Sherry et du défendeur appelant. Nous dirons cependant que la preuve de ce paiement de $100 ne pouvait être faite par témoins, et qu'elle doit être rejetée. Il suffit sur ce point de référer aux autorités suivantes : Code Civil du B. C., art. 1233 ; Pothier, *Obligations*, n°s 694 et 695 ; Troplong, *Prescription*, n° 622 ; Toullier,

tome 9, n° 97. *Troisième question* : La dernière question est une question de fait. L'appelant a-t-il fait voir une crainte de trouble suffisante pour le justifier de retenir le prix de l'immeuble entre ses mains ? Ainsi que nous l'avons établi ci-dessus, l'hypothèque que l'appelant invoque pour se justifier de ne pas payer est prescrite depuis longtemps. Néanmoins, c'est cette hypothèque seule que craint l'appelant. Il allègue que MacDonald est cessionnaire de cette créance et et qu'il menace de le poursuivre. Deux observations suffiront pour démontrer que ceci n'est pas sérieux. 1° Le transport fait à MacDonald *n'a jamais été signifié* à l'appelant, et bien que ce dernier eût été mis sur ses gardes sur ce point, par les réponses de l'intimé, en Cour Inférieure, il n'a pas même tenté de prouver que cette signification avait été faite. 2° Il se dit menacé de poursuite par MacDonald ; où en est la preuve ? Il n'a pas même osé examiner MacDonald sur ce point, et pour cause. Et, d'ailleurs, comment MacDonald pourrait-il le menacer de le poursuivre avant même de faire signifier son transport ? La seule question sérieuse dans la cause est donc la première, et l'intimé croit l'avoir résolue d'une manière satisfaisante. La Cour Supérieure d'Iberville lui a donné gain de cause, et la Cour de Revision a confirmé ce jugement. L'intimé a toute confiance que ce tribunal ne pourra qu'approuver ces décisions et renverra l'appel.

CARON, J. : Il faut voir les faits au factum de l'intimé, qui est très bien fait et qui traite la question que soulève cette cause. L'action est par l'intimé, cessionnaire de Henry Sherry, contre l'appelant, pour balance du prix de vente de l'immeuble que lui a vendu ledit Henry Sherry, cédant de l'intimé. L'action est personnelle contre l'appelant comme aurait pu la porter Sherry lui-même, le cédant. Il est pourtant dit au factum de l'intimé, page 1, que l'action est personnelle et hypothécaire. Je ne la crois que personnelle, portée contre l'acheteur lui-même. Le défendeur a plaidé que la terre qu'on lui a vendue est chargée d'une hypothèque, qu'il indique au montant de £170, pour laquelle il est menacé d'être poursuivi hypothécairement, par suite de quoi il n'est tenu de payer à moins que l'on fasse disparaître cette hypothèque ou donner caution. Réponse de l'intimé : cette hypothèque est prescrite, n'existe plus, et le défendeur ne court aucun danger d'être troublé. Enquête de part et d'autre et questions soumises : 1° Henry Sherry, qui est prétendu avoir prescrit l'hypothèque par possession de 14 ans avec titre (donation de son père), connaissait l'existence de la créance *Souprus*. Cette connaissance l'a-t-elle constitué en mauvaise foi, de manière à l'empêcher de prescrire ? 2° Le paiement qu'il a fait à la succession *Souprus* à compte de cette créance hypothécaire a-t-il interrompu la

prescription ? 3° Le défendeur (appelant) a-t-il raison de craindre le trouble qu'il allègue ? La première question, d'après les autorités citées par l'intimé, et autres, doit se décider en sa faveur ; elles établissent que la connaissance qu'a la possesseur d'un immeuble de l'hypothèque dont il est chargé ne l'empêche pas de prescrire pour s'en libérer comme le dit en propres termes Troplong, cité à la page 3 du factum de l'intimé comme suit : " La bonne foi existe, quand même le tiers détenteur aurait su " que le prix était dû, car il peut légitimement penser que le " vendeur originaire serait payé par son acquéreur direct." Cette doctrine est confirmée par les auteurs cités au factum, ce qui décide affirmativement la première question posée. Il en est de même pour les mêmes raisons de la seconde, le paiement allégué est prouvé par Henry Sherry seulement ; or, il dit positivement que c'est avec l'argent de son père, et comme agent de son père, qu'il a fait ce paiement à la succession *Soupras*, sur le prix de la vente, ce qui devait le confirmer dans sa bonne foi, et lui faire croire que la créance serait payée par son père, l'acheteur originaire et débiteur personnel. Ce paiement n'a donc pas interrompu la prescription ; si tel est le cas, l'hypothèque invoquée par le défendeur était depuis longtemps éteinte et prescrite lorsqu'était portée la présente action. Le défendeur, n'ayant aucune raison de craindre d'être troublé, devait être condamné à payer la somme demandée, c'est ce qui a été fait par le jugement dont est appel, lequel doit être confirmé. Il en serait autrement s'il s'agissait d'une prescription acquisitive sur laquelle nous ne sommes pas appelés à nous prononcer dans l'espèce.

Judgment of Superior Court confirmed. (15 *J.*, p. 227, et 1 *R. L.*, p. 697)

L. G. MacDonald, for appellant.

Strachan Bethune, Q. C., counsel.

Jetté and Archambault, for respondent.

ASSIGNMENT UNDER THE INSOLVENT ACT.

Court of Review, Montreal, 30th November, 1870.

Coram Berthelot, J., Torrance, J., Beaudry, J.

Martin *vs* Thomas dit Tranchemontagne.

Held : 1° That an insolvent under the Act has no legal interest to plead an assignment made by him under the Act, in bar of proceedings on compulsory liquidation.

2° That, in case of an assignment so made to an official assignee, non-resident in the county or place where the insolvent has his domicile,

evidence must be adduced, by the party pleading such assignment, that there is no official assignee resident in such county, and this notwithstanding that the sheriff, in his return to the writ of attachment, certifies that there is not an official assignee so resident, and that, in consequence thereof, he has appointed a special guardian.

3° That a petition to stay proceedings fyled by an insolvent, after the expiration of five days from the demand of an assignment, on the ground that he has assigned to an official assignee, is too late.

This was a hearing in review of a judgment rendered by Mr Justice LAFONTAINE, at Aylmer, in the district of Ottawa, on the 18th of June, 1870, maintainingt he petition of defendant to stay the proceedings of plaintiff in compulsory liquidation by writ of attachment, under the Insolvent Act of 1869, ch. 16, and quashing the attachment. The insolvent resided at Bonsecours, in the district of Ottawa, where a demand of assignment was served on him by plaintiff on the 21st December, 1869. On the 29th December, 1869, the insolvent made an assignment in notarial form, to Henry Howard, official assignee, residing at St-Andrews, in the district of Terrebonne. On the same day, plaintiff sued out proceedings in compulsory liquidation by writ of attachment, at Aylmer. The writ was served on the insolvent on the 30th December, 1869, and was returned on the 10th January, 1870. And, in his return, the sheriff certified that there was no official assignee resident within the district of Ottawa, and that in consequence he had appointed a special guardian. On the 12th January, 1870, the insolvent caused a petition to stay proceedings to be served on the plaintiff. which was fyled on the 13th of January, 1870. By this petition, the insolvent pleaded the assignment to Howard, alleging that there was no official assignee resident in the county or place where the insolvent had his domicile, and that Howard was the nearest resident assignee. To this petition, plaintiff fyled a general answer on the 16th of February, 1870. No evidence of any kind was adduced in support of the petition, and the parties having been heard before the judge, he rendered the following judgment, on the 18th of June, 1870: "Considering that, at the time of the execution of the present attachment, defendant was an insolvent, and his estate and effects vested in the hands of an assignee, maintaining the conclusions of the petition, it is considered and adjudged that the attachment, and all the proceedings thereunder, be, and the same are hereby set aside and quashed, and, further, the *demande* of plaintiff is hereby dismissed."

The following was the judgment of the Court of Review: "La cour, considérant que Joseph Thomas dit Tranchemontagne était mal fondé en la requête par lui présentée le 13 janvier 1870, et qu'il n'a fait aucune preuve légale au soutien d'icelle, et qu'il était sans intérêt à présenter ladite

requête ; considérant, de plus, que la cession ou le prétendu acte de cession invoqué par le défendeur en sa requête était tardif et sans effet, n'ayant pas été fait dans les cinq jours suivant le 21 décembre 1869, la cour, pour ces raisons, a cassé, revisé et annulé le jugement du 18 juin 1870, et a renvoyé et rejeté ladite action. (15 *J.*, p. 236)

PERKINS and MONK, for the plaintiff.

Hon. J. J. C. ABBOTT, Q. C., for defendant.

ASSIGNMENT UNDER THE INSOLVENT ACT.

COURT OF QUEEN'S BENCH, Montreal, 22nd January, 1872.

Coram DUVAL, CH. J., CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

THOMAS dit TRANCHEMONTAGNE, defendant in the Court below, appellant, *and* MARTIN, plaintiff in the Court below, respondent.

Held : That a petition by an insolvent to stay proceedings under the Insolvent Act of 1869, S. of C., ch. 16., made after the expiration of five days from the demand of an assignment, on the ground that the insolvent has executed a deed of assignment to an official assignee, is too late.

This was an appeal from the judgment of the Court of Review, at Montreal, reported suprà, p. 447.

BADGLEY, J., *dissentiens* : This case comes up upon proceedings in insolvency. It is a contest between a voluntary assignment and a demand for compulsory liquidation. In September, 1869, a demand of assignment was made upon appellant, under the Act of 1869, S. C., ch. 16. No answer was made by the debtor to this application during the five days limited by the statute, and, consequently, the writ issued for compulsory liquidation, on the 29th of September, 1869. Upon the same day, the debtor had made a voluntary assignment to an official assignee. That voluntary assignment vested all the property of the debtor in the hands of the assignee. The debtor resided some distance up the Ottawa, where there was no official assignee, and was obliged to come down fifty or sixty miles to Saint-Andrews, that being the place where the nearest official assignee was situated, to make his voluntary assignment. While he was absent for this purpose, the compulsory writ was issued at Aylmer, upon the same day that he made the voluntary assignment at Saint-Andrews. The question is, simply, which of these proceedings is the preferable one. In

my opinion the voluntary assignment is the preferable proceeding, and, for this reason: The voluntary assignment at once vests the estate in the assignee. The compulsory writ does not do so. Certain acts are required to be done by the seizing officer so as to make the seizure good. More than that, after the writ of attachment is issued, the debtor has still three days to contest the writ of attachment. It must also be borne in mind that both these proceedings were simply proceedings to put the estate into insolvency, that is, to investigate and manage the affairs of the debtor for the benefit of his creditors. The proceeding that does that immediately is certainly preferable to one that requires time. The voluntary assignment, therefore, being made, and vesting by operation of law all the estate and effects of the debtor in the hands of the assignee, the debtor had nothing further to be operated upon; the sheriff had nothing to seize. Then, there is another circumstance: It is said that the five days' limit is absolute, that they are conclusive upon the debtor. They are conclusive so far: they were for the purpose of enabling him to arrange with his creditors, or for showing that he was not insolvent. If he did not use the five days' time to take advantage of irregularities, he had three days after the return of the writ in which to do the same thing; and until the expiration of the three days he was not an insolvent, but a mere debtor. Under these circumstances it seems to me that the estate being vested in the assignee under the voluntary assignment, the writ in compulsory liquidation was useless, except to make expenses. Although adverse to maintaining the compulsory writ, I consider that the seizing creditor being in good faith, and not knowing that a voluntary assignment had been made, should be allowed all the first expenses of the writ.

MONK, J., also *dissentiens*: I quite concur in believing that there was no occasion for taking the compulsory writ, seeing that there was a voluntary assignment. I therefore think that the judgment at Aylmer, maintaining the petition of the debtor, was right, and that the Court of Revision was wrong in setting aside the petition. It has been stated that the debtor had no right to petition to set aside the compulsory writ after making an assignment. The Court of Appeals has held precisely the reverse of this. Until the proceedings in compulsory liquidation had taken legal effect by the expiration of the three days, the debtor was still in time to make a voluntary assignment. Besides this, voluntary assignments are viewed more favorably than proceedings in compulsory liquidation. I agree also with Judge Badgley, that the seizing creditor should get the costs of the seizure from the estate.

DRUMMOND, J.: I consider that the Court was precluded

from granting the petition of the debtor by a rigorous enactment which could not be got over. I would refer to secs 14 and 15 of the Insolvent Act of 1869, ch. 16, which set out if a debtor fails to meet his liabilities as they become due, a claimant for a sum exceeding $500 may make a demand upon him requiring him to make an assignment. Then, if the debtor contends that the demand was not made in conformity with the Act, &c., he may present a petition to the judge praying that no further proceedings be taken "but only within five days from such demand." Here are words of the most strictly limitative character. But pass on to sec. 17: "If such petition be rejected, etc., or if no such petition be presented within the aforesaid time, and the insolvent during the same time neglects to make an assignment of his estate, etc., his estate shall become subject to compulsory liquidation." These provisions, in my opinion, leave the Court no alternative but to maintain the writ in compulsory liquidation. We, therefore, confirm the judgment appealed from, and, in doing so, adopt the second *considérant* of the Court of Review, being the one referring to the five days.

DUVAL, CH. J.: We must consult the interests of creditors as well as the interests of debtors. I cannot hesitate in forming my opinion when I find that the law has stated what is to be done, in the most positive terms. It must be admitted that the proceedings of the creditor were correctly taken. Then, I ask how can the creditor be deprived of a vested right by an act of his debtor, done after the time prescribed by law? Even without the positive language of the law, I would say that the delay is not in the discretion of the Court. The proceedings in the Insolvency Court are of a summary character. A summary jurisdiction is vested in the Court. The delays prescribed must therefore be strictly conformed to. It is said the debtor used all the diligence he could. But the right to issue the writ became vested in the creditor, and of that right he could not be divested by any act of his debtor.

The written judgment was as follows: "La Cour, adoptant le second motif du jugement dont est appel, et considérant qu'il n'y a pas d'erreur quant au dispositif, cette Cour confirme, &c." (17 *J.*, p. 11)

Hon. J. J. C. ABBOTT, Q. C., for appellant.

WALSH and ROULEAU, for respondent.

J. A. PERKINS, counsel.

PREUVE.—CAUTIONNEMENT.

COURT OF QUEEN'S BENCH, APPEAL SIDE,
Montreal, 9th March, 1871.

Coram DUVAL, C. J., CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

JAMES MARTIN, defendant in the Court below, appellant, *and* ANDREW F. GAULT *et al.*, plaintiffs in the Court below, respondents.

Held: 1° That payment of money secured by a guaranty is not to be presumed to have been made in discharge thereof.

2° That a guaranty to a certain sum given for a third person is uncertain and unliquidated until the deficiency due by the third person has been ascertained.

3° That the composition discharge under the Insolvent Act of 1864, S. C., ch. 17, affects the insolvent only, but does not relieve outside parties, secondarily liable, not parties to the insolvent proceedings.

4° That the guaranty in question, signed by one partner in the name of the firm, was valid and binding.

5° That no proof being made as to the signature, and defendant not having denied the same (under affidavit), it was held to be signed by him.

The judgment of the Superior Court was rendered at Montreal, the 30th April, 1870, by His Honor Mr Justice TORRANCE, as follows: "The court, considering that defendant, "James Martin, hath not, in the terms of the Code of Civil "Procedure, article 145, by affidavit, denied that he or the def-"endants signed the letter of guarantee; considering the "several exceptions pleaded, not proved, etc., condemns the "defendants jointly and severally, etc., to $325.95, etc., with "costs."

D. GIROUARD, for appellant, contended that it was clear that the sum of $337.80 had been paid by P. Martin & Co. to Gault Brothers & Co., after the granting of the letter of guarantee, and, according to the principle of our Common Law, reproduced in our Code [art. 1161], which declares that payment should be applied on the most burdensome debt, the letter of guarantee in question is satisfied and extinguished to the extent of the said sum of $337.80; that a debt, for which security has been given, comes within the scope of the said article is too clear to be called in question; it suffices to quote from 2 Pothier, (Bugnet), Obligations, n° 567, Cor. 5, p. 304: "L'imputation se fait plutôt sur la dette pour laquelle le débiteur avait donné des cautions, que sur celles qu'il devait seul." The appellant pleaded specially the payment and satisfaction of the said letter of guarantee, and it is astonishing that the

Court below did not notice the said payment, and gave judgment for the respondents for the full amount claimed. The appellant contends that he was discharged from all liabilities of the firm of M. and J. Martin under the said deed of composition. No comment is necessary to show that appellant is discharged under the deed of composition from the payment of the letter of guarantee. It seems clear that, when respondents declared that "James Martin shall be entirely exonerated and discharged from the claims of the parties of the first part, respectively, against the late firm of M. and J. Martin," they should be held to mean all claims and causes of indebtedness against the firm. Finally, the provisions of the Insolvent Act of 1864, S. C., ch. 17, by which the deed of composition is governed, are conclusive in favor of appellant. A deed of composition and discharge has the same effect as an ordinary discharge obtained under the Act [sect. 9, § 3]. The consent in writing to the discharge of an insolvent "absolutely frees and discharges him from all liabilities whatsoever, existing against him and provable against his estate, which are mentioned and set forth in the statement of his affairs annexed to the deed of assignment, or which are shewn by any supplementary list of creditors furnished by the insolvent, previous to such discharge, and in time to permit the creditors therein mentioned obtaining the same dividend as other creditors upon his estate, or *which appear by any claim subsequently furnished to the assignee.*" As appellant has remarked, respondents subsequently fyled a claim for the letter of guarantee, on the 8th January, 1869, that is, three days before the declaration of the first dividend, six months before the declaration of the second dividend, and one year before the declaration of the last dividend, and five months before the *rétrocession* by the assignee to the insolvent, Michael Martin. The appellant also respectfully submits that, as the granting of a letter of guarantee is not within the ordinary course of business of a partnership, he cannot be charged with the said letter of guarantee, unless respondents fully establish that the same was given by himself, or with his knowledge, which they have failed to prove.

JOHN A. PERKINS, for respondents, argued: Appellant did not deny the signature to letter of guarantee, as required by article 145, *Code de Procédure*. It is therefore held to be his writing. That M. and J. Martin were satisfied with the letter of guarantee is proven by the fact of their adding certain words thereto before signing the same. No payments beyond credits given in accounts and statements are proven, and therefore the first plea of appellant is wholly unsupported by

any evidence whatever. The guarantee was promised by both Patrick Martin and Michael Martin long before it was given respondents. Respondents have never compounded for or received aught on account of balance due on letter of guarantee. In his proceedings in insolvency Michael Martin studiously avoided mentioning any claim that might arise against him under the guarantee: An insolvent debtor is only discharged from such debts as are made known by him or by the claimants. Were it otherwise, how would the number or amount required for composition be ever computed? The Act of 1864 is positive upon this point. Never have respondents claimed in insolvency for amount now sued and received anything under any such claim. The guarantee covers the amount due now, as disclosed by the evidence adduced and by the terms of guarantee itself. The appellant is not a party to any proceedings in insolvency of Michael Martin. He is not bound thereby, and has not been discharged of this debt now claimed. By appellant's exhibit n° 2 the creditors (among other respondents) only compounded for and discharged Michael Martin of such claims as were made known at the time and included in schedule attached to such deed. In this schedule we find the debt of Gault Brothers and Co., fixed at $3308.69. The amount now claimed is not included therein.

DRUMMOND, J., dissenting, was of opinion that the guaranty for a particular purchase to the extent of $400 was discharged by the payment of over $400 on that purchase by P. Martin & Co. The guaranty was not a continuing one, and for $400 only. He would reverse judgment appealed from and dismiss suit of respondents.

BADGLEY, J., giving the judgment of the Court: In May, 1867, the firm of P. Martin & Co., of St-Placide, composed of Patrick Martin and J. Bte. Decary, opened a credit with Gault Brothers & Co., of Montreal, and purchased from them goods to the amount of $710.94, payable at the usual terms of credit, and for $400, of which they were to give the sellers the guaranty of M. and J. Martin, of Beauharnois, composed of Michael and James Martin. The guarantee dated the 27th of September following, four months after the purchase, was given to Gault Brothers about the time of its date, and was in the following terms: " Beauharnois, 27th September, 1867. " Sirs, we hereby agree to guarantee payment of P. Martin & " Co's purchase from now to the extent of $400, for goods " purchased by them last spring. Yours, &c., M. and J. Mar- " tin." At the date of the guarantee M. and J. Martin were in business connections to a considerable amount with Gault Brothers, and their guarantee was at once accepted by the latter. In the month of January, 1868, the firm of M. and J.

Martin was dissolved by the retirement of James, the appellant, and the business was continued by Michael Martin, in his own name, until the following 23rd of June, 1868, when he became insolvent, and, by the operation of the Insolvent Act, he assigned for $21,805, including in his schedule of liabilities his creditors, Gault Brothers, for $3,223.67, as due by notes, and for which they filed their claim in due course in insolvency which was afterwards duly allowed, less $600, for which claimants retained mortgage security, but the liability upon the guaranty above mentioned was not included in the schedule of creditors. On the 18th of July, 1868, Michael Martin the insolvent, offered a composition of 6s. 3d. in the £ to the creditors for himself, *as an individual and as late copartner of the firm of M. and J. Martin*, which was duly accepted, and, in consequence, the usual deed of insolvent composition was executed between himself and his creditors, and the composition was in due course paid to and received by them, whereupon he was discharged from his schedule liabilities, and his estate subsequently returned into his possession. At the date of the composition discharge, the guaranty above mentioned was only an indirect liability against Michael and James Martin for P. Martin & Co., who were still doing business, and who only followed Michael's example of going into insolvency some time after, namely, on the 16th of November, 1868, but with a worthless estate and without offer of composition. When P. Martin & Co. became insolvent, the balance in account current due by them to Gault Bros., after crediting payments on account and debiting and crediting interest in the usual mercantile manner, was $320.95, which at once fixed the amount covered by the guaranty, and for which this action has been instituted by Gault Bros., the respondents, against Michael Martin and James Martin, jointly and severally, as an undischarged liability of their late firm; both were brothers of Patrick Martin, the leading partner of the insolvent firm of P. Martin & Co., and doubtless interested in their brother's prospects and advantage. Several pleas have been filed against the action, the principal of which need only be noticed here. The first of these is, in effect, a plea of payment by the application of the payments made to Gault Bros. by P Martin & Co., previous to their insolvency, on account of their debt, and which payments, amounting to more than $400, it is pleaded, discharged the guaranty by the mere effect of the payments made. Now, this involves the defining of a guaranty which Fell says " is a promise to answer for the payment of some debt, etc., in case of the failure of another person who is in the first instance liable to such payment." The guaranty is a collateral to the main engagement, and as tersely

observed in 2 Pardessus, p. 523, "le cautionnement d'un crédit diffère de celui d'un simple emprunt," and the difference in its legal effect is shewn in 3 Delvincourt, 252, and Savary Parêve, 74; it is not a merely legal suretyship. Pitman, Principal and Surety, p. 74, says: "A guarantee being a contract of indemnity, to make good the default of the party for whom the guarantee is given, is therefore not an *absolute debt* but an engagement to pay what shall be found due from the principal [necessarily within the amount limited by the guarantee], and until that fact of what shall be found due is known, it is in the nature of a claim for unliquidated damages." 4 Esp. N. P. Cases, 207. Now the engagement of guaranty may, as here, be confined to a particular dealing or transaction, or it may extend to a series of dealings. If a single dealing or transaction only is contemplated, the guarantee is extinguished when or as soon as the contemplated dealing or transaction *has been completed or satisfaction made by the principal*, and at p. 41, Pitman says: "Again the liability of the guarantor is coexistent with that of the principal upon the particular transaction in regard to which such liability is assumed;" thus extending to the non-satisfaction of the whole purchase within the limit of the guaranty. It has been proved that the purchase remained unsatisfied to the extent of $325.95, the balance of the particular dealing for which the guarantee was given, and that balance so fixed constitutes the liquidated debt due by the guarantors. Assuming the above to be established and conclusive, the question of the appropriation of payment, as pleaded here in payment of the guaranty, is explained in *Plomer* vs *Long*, 1 Starkie N. P. Cases, p. 153, being an action on a bond in which there was a surety. It was contended that the payments made by the principal subsequent to its execution ought to be appropriated to the bond in favor of the surety; *sed per* Lord Ellenborough, C. J.: "The plea is payment, and the question is whether the payment was made *animo solvendi*. The general rule is, that where nothing is directed as to the application, the person who receives it may apply it; in a court of law this cannot be considered a payment in discharge of the bond, without some circumstances to show that it was so intended." Here the payments were not made or applied to discharge the guaranty, and the respondents' clerk proves that the payments were agreed by the principal, P. Martin & Co., that they should not affect the guaranty for the remaining balances after each payment. The point of the application of payments in this case will be found in Fell and also in Delvincourt and Savary above referred to, and does not require to be discussed here. Again, where the guarantee is general it is *in omnem causam*, as shown by Delvincourt, loc. cit. If the guarantors desired to escape from

the interest chargeable on the principal's purchase, they ought to have taken their precautions to protect themselves against it, which they have not done. As to the partnership signature to the guaranty, it is sufficient to bind the partnership if uncontradicted. The presumption of liability, according to our law, favors the liability of the partnership. It was for the appellant to establish the fact that he, as a partner of the firm, was relieved. He has not done so, and it stands good against him. The next plea to be noticed is the averment of the effect of the insolvent's discharge, under the deed of composition by Michael, as also discharging James the appellant. It is necessary to observe that this appeal has been instituted by James only; the judgments appealed from, so far as Michael is concerned, stand in full force by the effect of his acquiescence, and the only question raised by this plea is whether the deed of composition between Michael and his creditors, his payment of his composition to his creditors, and the consequent discharge in insolvency upon the deed, relieved and discharged James from this claim, James not being a party to Michael's proceedings in insolvency and without privity to this deed of composition and discharge. It is proper to state that the liability of Michael and James was several as well as joint, and as no insolvent proceedings were had by James, and he in no way participated in the composition or its payment to the creditors, he necessarily remains within the exceptive provision of the 4 sub-sec. of sec. 9 of the Insolvent Law of 1864: "A discharge under this Act shall not "operate any change in the liability of any person or com-"pany secondarily liable for the debts of the insolvent, either "as drawer or indorser, guarantor, etc., nor of any partner or "other person liable jointly and severally with the insolvent "for any debt, nor shall it affect any mortgage, *hypothèque*, "lien or collateral security held by any creditor as security "for any debt thereby discharged." These are the words of the Statute under which James remains liable as the undischarged debtor upon this liability, and, therefore, Michael's composition discharge is quite inoperative for the benefit of the appellant. It only remains to add, as a matter of procedure, that, if the principal be insolvent, as the firm of P. Martin & Co., was, when the debt in which the guaranty is given becomes due, no demand need be made on the principal in order to bind the guarantor, upon the presumption that in such case no injury could be done to the guarantor by want of notice. Under these circumstances the appeal must be dismissed.

Judgment confirmed, Mr. Justice Drummond *dissentiente*. (15 *J.*, p. 237)

D. GIROUARD, for appellant.

JOHN A. PERKINS, for respondents.

SECURITY FOR COSTS.

CIRCUIT COURT, Cowansville, 3rd March, 1871.

Coram RAMSAY, A. J.

WEBSTER *vs* PHILBRICK, *and* WILKIE, opposant, and plaintiff contesting.

Held: That the plaintiff, residing out of the Province, cannot be compelled to give security for costs, nor can his attorney *ad litem* be compelled to produce his power of attorney on an issue raised by the plaintif contesting the opposant's opposition.

PER CURIAM: This is a motion on the part of opposant to compel plaintiff contesting the opposition to give security for costs and to file a power of attorney to his attorney *ad litem*. This is really the matter of two motions. As to the security for costs, art. 29 C. C. provides that "Every person, not resident in Lower Canada, who brings or institutes any action, suit or proceeding in its courts, is bound to give to the opposite party, whether a subject of Her Majesty or not, security for the costs which may be incurred in consequence of such proceeding." This article is taken from the 41 Geo. III, c. 7, sec. 2, which provides that: "in all actions, oppositions and suits prosecuted before the courts of civil jurisdiction in this province, by any person or persons, residing without the province, whether such person or persons be subjects of Her Majesty or not, the defendant or defendants, or others concerned, may demand and obtain good and sufficient security, at the discretion of the said court, for payment of their costs, in case the *plaintiffs* or *prosecutors* should fail in such their said actions, oppositions or other suits; and all proceedings shall be stayed and suspended, until such security shall have been offered and received." The interpretation of this section gave rise to some question (see *Mayer et al.* vs *Scott, and Benning et al.*, tiers saisis, 4 L. C. J., p. 46, 8 R. J. R. Q., p. 154; *Brigham* v. *McDonald et al.*, and *Devlin*, opp., 10 L. C. R., p. 452, 8 R. J. R. Q. p. 460, and 19 R. J. R. Q., p. 407; *Scott et al.* vs *Austin and Young et al.*, 5 L. C. J., p. 53, 9 R. J. R. Q., p. 23). In the C. S. L. C., cap. 83, sec. 68 the wording was slightly altered. I only notice the slight difference in the wording of the statute of the 41 Geo. III, and that of the statute proclaimed in the 24th of the Queen, to show that, with the jurisprudence before them, and paying the minutest attention to the phraseology of the law, the persons to whom the consolidation of the statutes was confided maintained the old wording in all essentials. It may be safely stated that,

before and after the consolidation, the jurisprudence was uniform, with the exception of the case of *Mahoney et al.* vs *Tomkins and Geddes*, 9 L. C. R., p. 72, 7 R. J. R. Q., p. 112 and 19 R. J. R. Q., p. 408, which seems to have been decided under some misapprehension as to the previous jurisprudence. But on the most careful examination I can give to the reported cases, they seem to me, with this exception, to indicate the principle that the absentee plaintiff should be held to give security for costs, and not the absentee defendant. This too is in conformity with the old law of France : " L'étranger doit donner la caution *judicatum solvi* ; au reste cette caution n'est due par l'étranger que lorsqu'il est demandeur, parce que s'il comparait en jugement ce n'est que parce qu'il est forcé," arrêt du 13 février 1581 ; Pothier, *Tr. des personnes*, p. 577. The case of *Mahoney et al.* vs *Tomkins and Geddes* is further overruled in the case of *Brigham* vs *McDonnell et al.*, and *Devlin et al.*, tiers-saisis, already cited, and in the case of *Morrill* vs *McDonald et al.*, and *Ross et al.*, bpps, 6 L. C. J., p. 40, 9 R. J. R. Q., p. 491, and 19 R. J. R. Q., p. 407. I may further add, that the cases cited in support of *Mahoney et al.* vs *Tomkins and Geddes* do not appear to me to be incompatible with a ruling different from that which obtained in that case. In *Benning* vs *The Rubber Co.*, and *Young et al.*, 7 R. J. R. Q. pp. 42 et 112, and 19 R. J. R. Q., p. 408, the contestation was not of an opposition but of a collocation of a judgment of the court, and therefore it was that Mr. Justice MONDELET held that as opposants, those contesting the collocations were within the 41 Geo. III (2 L. C. J., p. 287). The other case cited in support of the ruling in *Mahoney et al.* vs *Tomkins and Geddes* was the case of *Church* vs *Bostwick and Wheeler*, 7 R. J. R. Q., p. 112, and 19 R. J. R. Q., p. 408. It is not reported ; but it is only necessary to say that the contestation there was the declaration of a *tiers-saisi*, and that therefore it is similar to the case of *Mayer et al.* vs *Scott, and Benning et al.*, 4 L. C. J., p. 146, and is not a case in point. But, on the other hand, how can the case of *Mahoney et al.* vs *Tomkins and Geddes* be reconciled with *Scott et al.* vs *Austin and Young et al.*, 5 L. C. J., p. 53, which condemned a non-resident intervening party to give security ? Who is the *intervenant* in the present case ? Clearly the opposant. If both *intervenant* and plaintiff have to give security for costs, and the plaintiff contesting is to be held to be plaintiff on the contestation, then both opposant and contesting party must give security, which is absurd. I need not combat the pretension that the origin of the proceeding is the execution, for no one has ever pretended that the plaintiff executing his judgment shall give security, although it is a new *instance*. I have entered thus at length into an examination of these

cases on account of the case of *Baltzar et al.* vs *Grewing, and Hutchinson et al.*, 19 R. J. Q. R., p. 407, which, rejecting the ruling in *Morrill* vs *McDonald et al.*, and *Ross et al.*, and of *Brigham* vs *McDonnell et al.* and *Devlin*, confirms the ruling in *Mahoney et al.* vs *Tomkins and Geddes et al.* This decision seems to have been to some extent influenced by the terms of the C. C., art. 29, which it becomes therefore important to examine. The act respecting the codification of the laws of Lower Canada, relative to civil matters and procedure, cap. 2, sec. 15, C. S. L. C., provides that " the said Codes shall be framed in the french and english languages, and the two texts, when printed, shall stand side by side." Notwithstanding this declaration of equality of " the two texts," it is evident that one text must necessarily be the original; and, as a fact, article 29 of C. C. was drafted in french. In addition to this, the last article of the C. C. (2615) declares that " if in any article in this code, founded in the laws existing at the time of its promulgation, there be a difference between the english and french texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded." Now, on looking at the article 29, it will be seen that it purports to be old law, that is, the law of 41 Geo. III, which is, in its turn, an adoption of the law as explained by Pothier. On referring to the french version of art. 29, it will be seen that there is a difference in the two texts. The english text says: " who brings or institutes any action, suit or proceeding in its courts," etc.; the french version says: " qui y porte, intente ou poursuit une *action*, instance ou procès," etc. The translation of *procès* by the word *proceeding* is glaringly inexact. A contestation of an opposition is a proceeding, but it certainly is not a *procès*. The french text being the original, and above all the most consistent with the law existing at the time of the promulgation of the code, I must be bound by it. But really the difference of opinion seems to be as to which is plaintiff—the opposant or the contesting party. On this point I cannot understand there being a doubt. A fair test is to ask: " Who has the right to begin and to reply?" Evidently the opposant. He is therefore plaintiff and cannot have security from the plaintiff contesting the opposition. While on art. 29, it may be a matter of curiosity to know that the words in the original draft were " partie attaquée ou poursuivie," but that the precaution of using this circumlocution became unnecessary from the careful wording of what precedes. As contestant is not plaintiff, he is not obliged to produce any power of attorney. The motion is, therefore, dismissed with costs. (15 *J.*, p. 242)

ERNEST RACICOT, for opposant.

O'HALLORAN and MITCHELL, for plaintiff contesting.

VENTE.—GARANTIE.

COUR DU BANC DE LA REINE, EN APPEL,
Montréal, 9 juin 1868.

Coram DUVAL, J., AYLWIN, J., CARON, J., BADGLEY, J., DRUMMOND, J.

LALONDE *vs* CHOLETTE.

Jugé: Que la convention de fournir une quantité *du meilleur blé qui poussera sur la terre donnée* oblige le donataire à fournir du bon blé: si celui que la terre a produit n'est pas bon, le donataire devra en acheter.

Le Juge CARON, *dissentiens*: L'appelant a donné une terre à son fils, à la charge d'une rente viagère, dans laquelle est comprise une quantité de 40 minots de blé *du meilleur que la terre produira*, déduction faite du blé nécessaire à la semence. L'intimé a acheté cette terre du fils du donataire, et s'est obligé à la prestation de cette rente. Une difficulté est survenue entre le rentier et l'acquéreur, à propos de la dernière année de la rente de blé. L'intimé a offert les 40 minots de blé, mais le rentier les a refusés, parce qu'ils n'étaient pas convenables, et il a pris la présente action hypothécaire. Il est prouvé que le blé offert était mauvais, de sorte que, si nous avions à juger sur la cause ordinaire de fournir du blé *loyal et marchand*, l'intimé serait en défaut. Mais l'acte exige seulement que le blé sera le meilleur que la terre produira, et il est en preuve que c'était le meilleur de la récolte, à l'exception de 20 minots dont 12 ont été réservés pour la semence, et 6 sont compris dans les offres. Je trouve donc que les offres étaient valables, et que l'appelant avait tort de se plaindre. Le blé était mauvais, mais il avait été préparé avec soin, et criblé deux fois: de plus, l'année était mauvaise, et le grain n'était beau nulle part. Suivant moi, l'action devrait être déboutée.

Le Juge BADGLEY: Le donateur s'était réservé une rente de blé, afin d'avoir du pain pour vivre, et, lorsqu'il a stipulé que ce serait le meilleur que la terre produirait, il entendait qu'il fût propre à faire du pain, tandis que celui offert n'était pas convenable pour cela. Au lieu de semer de l'avoine et d'autres grains, l'intimé devait semer du blé et du bon blé. S'il sème du bon blé, il en récoltera du bon, et, s'il en sème du mauvais, il en achètera pour payer sa rente. Nous infirmons donc le jugement de la Cour Inférieure, avec dépens. (1 *R. L.*, p. 700)

BONDY et FAUTEUX, pour l'appelant.

DOUTRE et DOUTRE, pour l'intimé.

VALEUR DES SERVICES DE MEDECIN.

COUR DU BANC DE LA REINE, EN APPEL,
Montréal, 9 juin 1868.

Coram DUVAL, AYLWIN, CARON, BADGLEY, DRUMMOND, JJ.

BOUCHER *et al.* et DUHAULT.

Jugé : Que la réclamation du médecin, pour services professionnels, doit se taxer sur la valeur réelle des services rendus, et que la prétention de l'élever suivant la fortune du patient est immorale.

Le Juge BADGLEY: L'intimé, médecin, a poursuivi les héritiers de Boucher, pour services rendus à ce dernier. Il n'y a dans cette cause qu'une question de preuve. Par la loi, le médecin a droit d'offrir son serment pour établir la nature et la durée des services rendus durant l'année de la poursuite (art. 2260, § 7, Code Civil), mais ce serment n'établit pas la valeur de ces services, et il faut établir cette valeur, comme dans tous les autres cas. Ici la preuve est contradictoire. Certains médecins apprécient cette valeur d'après un tarif qui n'est pas produit, et d'après le principe immoral que le médecin ne doit pas être payé suivant la nature des services donnés et le temps qu'il y a consacré, mais suivant la richesse du patient, ne laissant ainsi aucune limite possible au prix qu'il en réclamera. En réduisant le prix des visites d'un tiers, des deux tiers, et même à dix chelins, l'intimé sera suffisamment rétribué, suivant les témoins de la défense. D'après cette échelle, le plus que nous puissions accorder est £150, au lieu de £500 accordés par la Cour Inférieure : sur cette somme de £150, il faut déduire £22 payés par Boucher, £30 dus à la succession, et quelques autres items qui réduisent le compte à £89 9s. 6d., pour laquelle somme nous accordons jugement, avec les dépens de la Cour Supérieure, pour une action de ce montant contre les appelants, et ceux de cette cour contre l'intimé. (1 *R. L.*, p. 702)

MM. SENÉCAL et RYAN, pour les appelants.

L'HONORABLE A.-A. DORION, conseil,

E.-U. PICHÉ, C. R., pour l'intimé.

CRÉANCIERS CONDITIONNELS.—ACTES CONSERVATOIRES.

COUR DE REVISION, Montréal, 30 mai 1868.

Coram MONDELET, BERTHELOT, MONK, JJ.

ROUSSELLE *vs* PRIMEAU.

Jugé: 1° Qu'un créancier éventuel ou conditionnel a droit de faire tous les actes conservatoires nécessaires pour s'assurer le paiement de sa dette.

2° Que pour cela il peut refuser de payer et garder entre ses mains toute somme d'argent qu'il doit à celui dont il est le créancier éventuel, si celui-ci est insolvable.

Le juge MONDELET: La demanderesse s'étant pourvue en Cour Supérieure, dans le district de Montréal, pour le recouvrement de $465, montant d'une obligation à elle consentie par le défendeur le 12 mai 1864, le défendeur plaida, par une exception péremptoire, que Marc-Antoine Primeau, par son testament du 11 octobre 1856, institua la demanderesse, son épouse, sa légataire universelle en usufruit, avec charge de remettre les biens à leurs enfants, et, à défaut d'enfants, à ses héritiers légaux; qu'après la mort d'Antoine Primeau, la demanderesse accepta le legs en question, et prit possession des biens de son mari, dont la valeur, après les dettes payées, etait de £10,000. Le défendeur allègue, de plus, que la demanderesse, par sa fraude, a rendu cette succession notoirement insolvable, en laissant vendre les propriétés à vil prix, et détournant à son profit personnel les biens du défunt, et, qu'au préjudice de la succession, elle s'est fait passer, par le défendeur, l'obligation sur laquelle elle fonde son action, tandis que cette dette appartient à la succession de son mari. La défense continue d'alléguer que le défendeur est en droit de retenir le montant réclamé par cette action, pour se garantir d'éviction, à raison d'une hypothèque de £2,500 dont est grevée envers Ellice une propriété que Marc-Antoine Primeau lui donna en 1853, par acte de donation rémunératoire, avec garantie; qu'il a, à cet égard, protesté la demanderesse, et il conclut à ce que la demanderesse soit tenue de faire disparaître ladite hypothèque des livres du registrateur, avant qu'il soit tenu de payer le montant réclamé, à moins qu'elle ne donne bonnes cautions sur propriétés mobilières, contre toute éviction résultant de l'hypothèque envers Ellice. La demanderesse rencontra ce plaidoyer par une réponse en droit, prétendant qu'il n'y avait aucune connexité entre la créance réclamée et l'hypothèque à l'égard de laquelle le défendeur demandait un cautionnement, et que l'existence de cette hypothèque ne pouvait empêcher

la demanderesse de recouvrer le montant de son obligation; que ce n'était pas un cas où l'on pût demander un cautionnement. Le 15 novembre 1866, la cour, JOHNSON, juge, a maintenu la réponse en droit, et a rejeté l'exception du défendeur. C'est de ce jugement qu'appel est interjeté. Il me semble que la cour aurait dû, pour le moins, ordonner la preuve avant de faire droit au mérite, et s'assurer si les griefs du défendeur sont réels. En effet, si la demanderesse s'est frauduleusement fait consentir par le défendeur l'obligation, à elle personnellement, pour dettes dues à la succession dont elle est légataire usufruitière, et qu'elle ait rendu insolvable cette succession, laissant le défendeur sans aucun moyen de se faire garantir et indemniser par cette succession, à raison de l'hypothèque dont il allègue que la propriété donnée, avec garantie, par Marc-Antoine Pfimeau, est grevée, il doit être en droit, pour sa protection, de retenir entre ses mains cette modique somme de $465, qui n'est qu'une bien minime indemnité pour le trouble auquel le défendeur est exposé, à raison de l'hypothèque de £2,500 envers Ellice. La demanderesse est en droit, ou de faire radier l'hypothèque des livres du registrateur, ou de donner bonnes et suffisantes cautions, suivant que le défendeur le demande. Nous sommes donc d'avis d'infirmer le jugement simplement, et d'ordonner avant faire droit, que les parties procèdent à la preuve et au mérite. Jugement infirmé avec dépens. (1 *R. L.*, p. 703)

LEBLANC et CASSIDY, pour la demanderesse.

BARNARD et PAGNUELO, pour le défendeur.

LETTRE DE GARANTIE.—IMPUTATION.

COUR DU BANC DE LA REINE, EN APPEL,

Montréal, 9 juin 1868.

Coram DUVAL, AYLWIN, CARON, BADGLEY et DRUMMOND, JJ.

HENAULT *et* THOMAS et al.

Jugé: 1° Qu'un cautionnement par *lettre de garantie*, pour des avances à faire par une maison de commerce à un marchand, cesse d'avoir effet du jour qu'un membre de la maison de commerce qui fait les avances se retire de la société, quand même ce membre consentirait à figurer dans la raison sociale.

2° Que les reçus donnés au débiteur après cette époque au nom de l'ancienne maison de commerce, qui est encore celui de la nouvelle, ne s'imputeront pas sur les avances faites par celle-ci, mais sur celles garanties par le cautionnement.

Le juge en chef DUVAL, dissident: En 1865, l'appelant se porta caution, par une lettre de garantie, jusqu'au montant de

£200, envers Masson, Thomas, Bruyère et Cie, pour les avances qu'ils feraient à Lalonde. Le 23 mai de cette année, Masson se retira des affaires, mais il fut stipulé dans l'acte que les autres associés continueraient le commerce sous la même raison sociale jusqu'au mois de novembre suivant. Des avances furent faites à Lalonde, avant et depuis le mois de mai jusqu'au mois de novembre. Lorsqu'on régla alors le compte, Lalonde se trouva débiteur d'une somme excédant les £200 garantis, qu'il ne put payer. L'appelant donna alors son billet pour ce montant, et l'action a été portée en recouvrement de la valeur du billet. Hénault plaida qu'il avait donné ce billet par surprise, se croyant faussement obligé au paiement; il ne s'était engagé qu'envers la société Masson, Thomas, Bruyère et Cie, laquelle avait été dissoute le 23 mai 1865, et son cautionnement ne pouvait se continuer en faveur de la nouvelle société. Quant aux avances faites par Masson, Thomas, Bruyère et Cie, avant le 23 mai, elles avaient été payées par Lalonde, ainsi que le constatait le montant des reçus donnés postérieurement à cette date. Masson ne pouvait, en prêtant son nom à ses associés, obliger l'appelant envers ceux-ci dont il n'avait pas garanti les avances. Thomas était sous une fausse impression quant à la nature de la lettre de garantie; il a cru qu'elle couvrait les avances postérieures à la dissolution, vu que les affaires ont continué de se faire sous l'ancien nom; mais c'était une erreur, et je concours, sur ce point, dans l'opinion de la majorité de la cour. Je diffère d'opinion sur la question de l'imputation des reçus que les intimés ont donnés à Lalonde, après cette époque, et alors qu'ils continuaient à lui vendre; les reçus devraient être considérés donnés en paiement de la nouvelle dette, car il ne serait pas juste d'admettre la dissolution de la société pour ce qui est favorable à l'appelant, et de la rejeter pour ce qui lui est contraire. Il faudrait clore le compte, pour le débit et le crédit, au 23 mai. Or, à cette époque, il était dû une somme approchant le montant du cautionnement et, pour cette raison, Hénault devait être condamné à payer le billet qu'il a donné.

Le juge CARON, *dissident*, dit : qu'il adopte les vues du juge en chef sur la seconde question, mais, quant à la première, il irait plus loin. Je crois, dit-il, que la dissolution de la société n'a réellement eu lieu, vis-à-vis des tiers, qu'en novembre 1865. Jusqu'alors, les tiers avaient un recours contre tous les membres de l'ancienne société, par le fait que leurs noms apparaissaient dans la raison sociale; par conséquent, tous ces associés devraient avoir le droit de considérer la société dissoute, vis-à-vis des tiers, et de l'appelant, que du jour que le nom de Masson a disparu. D'où il faudrait continuer le compte jusqu'au 30 novembre 1865. Par ce moyen, Hénault devrait payer les £200 garantis, car Lalonde devait à cette époque près de

£300. Ou bien, adopter la voie indiquée par l'honorable juge en chef, de clore le compte le 23 mai, et, dans ce cas, l'appelant devrait payer £180, balance alors due : ce qui nous conduirait à un résultat à peu près identique.

Le juge BADGLEY dit : Que la société a été dissoute, de fait, à l'égard de l'appelant, le 23 mai 1865, et le cautionnement de celui-ci ne pouvait se continuer au-delà. Quant aux paiements faits, ils doivent s'imputer sur la dette continuée, parce qu'elle est la plus ancienne, et les reçus sont donnés au nom de Masson, Thomas, Bruyère et Cie : or, ces paiements éteignent toute la dette continuée. C'est ce que déclare le jugement de cette cour, laquelle considère le billet produit comme donné par erreur, sans valeur, et sur de fausses représentations. Le jugement de la cour inférieure est infirmé, avec dépens, et l'action des intimés déboutée.

Les juges DUVAL et CARON *dissidents*. (1 *R. L.*, p. 706)

LEBLANC et CASSIDY, pour l'appelant.

R. et G. LAFLAMME, pour les intimés.

MANDAT.

COUR DU BANC DE LA REINE, EN APPEL,

Montréal, 9 juin 1868.

Coram DUVAL, AYLWIN, CARON BADGLEY et DRUMMOND, JJ.

DUBRULE *et* LAFONTAINE.

Jugé : Que l'appelant, ayant obtenu une promesse de vente de l'agent publiquement reconnu d'une compagnie faisant le commerce de propriétés immobilières, et ayant pris possession du terrain, ne peut être dépossédé par cette compagnie, sans aucune raison valable.

Le juge BADGLEY *dissident* : Lafontaine, l'intimé, a acheté une terre, en vertu d'un bon titre, de la compagnie "British American Land Co.," et il poursuit l'appelant au pétitoire, pour le faire déguerpir. Celui-ci dit qu'il possède en vertu d'une promesse de vente que lui a consentie Stephens, l'agent de la compagnie, à Sherbrooke, après qu'il eut, suivant l'usage établi, fait une demande par écrit et déposé la somme de $40. D'après cette promesse, la compagnie s'est engagée à lui donner un acte de vente, lorsque l'appelant aurait fait un certain nombre de paiements, et défriché une certaine étendue de terre. Lafontaine prétend que cette promesse de vente ne vaut rien, parce qu'elle a été transmise au bureau central de la compagnie qui ne l'a pas agréée, et c'est plus tard qu'il a lui-même acheté. Dans l'intervalle, Dubrule avait pris possession

de la terre sur laquelle il a fait des améliorations jusqu'au montant de $105, ainsi que le constatent les experts. Je considère que l'appelant n'a fait aucune preuve du titre qu'il invoque: il ne produit pas sa demande à la compagnie dont Stephens seul constate l'existence; il n'a pas produit les pouvoirs de Stephens de représenter la compagnie, et une preuve verbale ne peut suffire pour dépouiller quelqu'un de sa propriété. Quant au dépôt de $40, il ne signifie rien, et il se le fera remettre. Dubrule a pris possession trop tôt, et il devrait être condamné à l'abandonner. Je ne concours donc pas dans le jugement de cette cause.

Le juge en chef DUVAL: Le demandeur Lafontaine n'est ici qu'un homme de paille, qui représente la compagnie, et cette action ne fait pas honneur à celle-ci. Tous les faits se rapportant à la vente faite à Dubrule sont clairement prouvés. Stephens lui-même, l'agent publiquement autorisé de la compagnie, l'a mis en possession du terrain; il a reçu le dépôt, mais, plus tard, il s'est découvert une mine sur la terre vendue; la compagnie se mit alors en frais de trouver des exceptions à la forme au titre de Dubrule. Jusque là, on n'avait jamais mis en doute l'autorité de Stephens, qui, depuis longtemps, vendait les terres de la compagnie, mais on a cru à propos de le faire dans le cas actuel. Croit-on que, si Lafontaine réussissait à faire déposséder Dubrule, il aurait la terre pour lui-même, en vertu du titre d'acquisition qu'il produit? Il est évident que non. Lafontaine n'est que l'homme de paille de la compagnie qui se sert de lui pour déposséder Dubrule. Si le droit et la justice doivent prévaloir dans nos cours de justice, cette action doit être déboutée. D'ailleurs, Lafontaine n'a jamais eu la possession du terrain en question, et il ne pouvait prendre une action pétitoire contre Dubrule qui détient la propriété.

Jugement infirmé, et action déboutée, avec dépens; le juge Badgley, *dissident*. (1 *R. L.*, p. 709)

CARTIER, POMINVILLE et BÉTOURNAY, pour l'appelant.

R. et G. LAFLAMME, pour l'intimé.

BORNAGE.—PRESCRIPTION.

COUR DU BANC DE LA REINE, EN APPEL,

Montréal, 9 juin 1868.

Coram : DUVAL, AYLWIN, CARON, BADGLEY et DRUMMOND, JJ.

RICARD *vs* LA FABRIQUE de SAINTE-JEANNE-DE-CHANTAL.

Jugé : Que le bornage demandé aura lieu suivant les clôtures et travaux actuels, lorsqu'ils existent depuis le temps requis pour acquérir, par la prescription, le fonds sur lequel ils sont construits.

PER CURIAM : Le Juge en chef DUVAL dit : Je regrette de voir une telle action intentée, c'est une véritable chicane de village ; la fabrique ne donnerait pas $5 pour le terrain qu'elle réclame ; elle sert ici de prête-nom à un ou deux marguilliers qui ont voulu exercer une vengeance contre leur curé, et le forcer à couper quelques arbres de son verger. L'action est en bornage : le curé plaide que la clôture existe au même endroit depuis plus de quarante ans, et il a prouvé ce fait. Nous infirmons donc le jugement de la cour inférieure, et ordonnons que la ligne sera tirée en suivant la ligne de division actuelle, et les clôtures maintenant entre les héritages des parties. (1 *R. L.*, p. 713)

DORION, DORION et GEOFFRION, pour l'appelant.

OUIMET et MOREAU, pour l'intimée.

RIVIERES NAVIGABLES ET FLOTTABLES.

COUR SUPÉRIEURE, Trois-Rivières.

Coram POLETTE, J.

GEORGE BÉLIVEAU *et al. vs* MARIE-LOUISE LEVASSEUR *et vir.*

Jugé : 1° Que les rivières navigables et flottables appartiennent au domaine public, et, comme telles, ne peuvent servir à un usage privé, de manière à gêner l'usage public.

2° Que personne n'a le droit de faire des constructions sur les rivières navigables et flottables, sans l'autorisation de l'autorité compétente ; que telles constructions ne sont permises de droit que sur des cours d'eau qui ne sont pas navigables et flottables.

3° Que même lorsqu'elles sont faites sur autorisation légale, les constructions sur les rivières navigables et flottables ne doivent pas gêner la navigation ou le flottage sur ces rivières.

4° Que, dans l'espèce, les demandeurs ne peuvent obtenir des dommages causés à leurs constructions par le flottage des bois de la défendéresse, vu que ces constructions étaient faites sur une rivière navigable et flottable.

L'Honorable Juge POLETTE : Les demandeurs réclament $350 de dommages qu'ils disent que la défenderesse leur a causés, en mai 1867, en laissant, par maladresse ou négligence, accumuler sur la chaussée de leur moulin, dans la rivière Blanche, canton d'Aston, une grande quantité de billots qu'elle faisait descendre dans cette rivière, lesquels furent précipités violemment, et en grande quantité à la fois, sur le glacis dont ils brisèrent et emportèrent, dans leur chute, une grande partie, ainsi que de la chaussée, faisant une cavité au bas du glacis de 25 pieds sur 50, et d'environ 10 pieds de profondeur. La défenderesse rencontre cette demande par une exception, par laquelle elle plaide : 1° Que son bois a été descendu avec toute la diligence et la prudence possibles, et en la manière accoutumée ; que, si la chaussée a été brisée ou endommagée, ce n'est dû à aucune faute ou négligence de sa part, mais plutôt à la force majeure causée par une crue extraordinaire d'eau survenue alors, et qui a pu occasionner des dommages dont, cependant, elle n'est pas responsable ; 2° Que la rivière Blanche en question est flottable, et qu'on y descend du bois de commerce depuis 25 ans passés ; 3° Que les demandeurs n'ont aucun droit de barrer la rivière, de manière à gêner la descente des bois, ou à les faire amonceler ; qu'il était de leur devoir d'empêcher l'accumulation sur leur chaussée, et que, si la chaussée a été endommagée par cette accumulation, c'est dû à leur propre négligence. Il est bien établi, 1° que cette rivière Blanche est flottable, et qu'on y descend des bois depuis bien des années ; 2° que les demandeurs y ont un moulin à scie, avec une chaussée qui traverse cette rivière, un glacis au bas, et une glissoire pour faire sortir et passer le bois de la chaussée, d'environ 13 pieds de large ; 3° que, dans le printemps de 1867, la défenderesse a fait descendre une assez grande quantité de billots dans cette rivière ; 4° que ces billots sont passés dans cette glissoire, et sur la chaussée des demandeurs ; que, dans le temps qu'ils y passaient, une partie de la chaussée et du glacis a été brisée et emportée, et qu'il s'est fait une cavité de plusieurs pieds d'étendue et de profondeur, sous le glacis ; 5° que les demandeurs ont payé $350 pour faire réparer leurs chaussée et glacis, et qu'ils ont souffert d'autres dommages pour retardement et trouble. Les demandeurs prétendent avoir droit de construire et de maintenir un moulin sur la rivière en question, avec les choses nécessaires à son fonctionnement, comme chaussée, glacis, etc. ; tandis que, de son côté, la défenderesse réclame le droit de se servir de la même rivière pour y descendre du bois. De là la nécessité d'examiner, *in limine*, jusqu'où doit aller le droit de chacun. Les lois romaines contiennent des dispositions assez amples sur la matière, et nous fourniraient les moyens d'en

venir à une solution, si les lois du pays étaient insuffisantes à cet égard. On y trouve divers textes qu'il peut être très-utile de rapporter. " Le préteur dit : Ne faites rien sur un fleuve " public ou sur ses rives, et n'y jetez rien qui empêche ou " doive empêcher la navigation ou l'usage de ses rades" (Pandectes de Justinien, traduction de de Bréard-Neuville, vol. 17, p. 511, liv. 43, tit. 12, loi 1ère). " Mais le préteur ne défend " pas toute espèce d'ouvrage fait dans un fleuve public " ou sur les rives, il défend seulement ce qui en *détériore* " *la navigation* ou les rades " (p. 515, même loi, § 12). " Le " préteur dit *détériorer la navigation ;* cela regarde la navi- " gation, et le mot *navigium*, dont il se sert, exprime même " quelquefois un vaisseau. On peut donc détériorer le chemin " d'un vaisseau. Ce mot *navigium* renferme aussi les RADEAUX, " parce qu'il est souvent nécessaire d'en faire sur les rivières. " On est censé avoir détérioré la rade ou la navigation d'une " rivière, soit qu'on ait rendu sa navigation impossible, soit " qu'on l'ait rendue seulement plus difficile ou plus lente ; ainsi " soit qu'on en ait dérivé l'eau, et qu'elle ne soit plus navigable, " soit qu'on l'ait élargie de manière que les eaux n'aient plus " assez de profondeur, soit qu'on l'ait rétrécie et rendue trop " rapide ; soit enfin qu'on en ait rendu la navigation incom- " mode, plus difficile ou impossible, il y a lieu à cet interdit " (même loi, §§ 14 et 15, p. 517). "Le préteur dit : Je défends *qu'on* " *fasse* ou qu'on jette rien dans une rivière publique ou sur ses " rives, qui en fasse couler les eaux autrement que l'été précé- " dent. Il regarde les rivières *publiques*, soit qu'elles soient navi- " gables ou qu'elles ne le soient pas"(Tit. 13, loi 1ère, § 2, p. 521). " Le préteur dit : Je défends qu'on fasse violence à personne, " pour l'empêcher de conduire un vaisseau ou un radeau sur " une rivière publique, et de décharger son vaisseau sur les " rives de cette rivière. Je donnerai aussi cet interdit pour " empêcher qu'on ne trouble la navigation sur un lac, un canal " ou étang publics. Cet interdit a pour but d'empêcher " qu'on ne trouble la navigation d'une rivière publique ; parce " que le préteur a pensé qu'il fallait protéger cette navigation, " *comme le libre usage d'un chemin public* pour lequel il a " donné le précédent" (Tit. 14, loi 1ère, § 1, p. 525). "Le préteur " dit : Je défends de faire violence à personne pour l'empêcher " de faire un ouvrage dans une rivière publique ou sur ses rives, " pour l'entretien de ses rives ou des champs voisins, *pourvu* " *qu'il ne détériore pas la navigation de cette rivière.* Mais " le préteur n'autorise pas par cet interdit toute espèce de ré- " paration. Il ajoute avec raison : Pourvu que la navigation ne " soit pas détériorée ; car on ne doit tolérer de réparations, " que celles qui ne nuisent pas à la navigation " (Tit. 15, loi 1re, " § 2, p. 527). On a demandé si celui qui avait des maisons sur

" les deux rives d'une rivière publique pouvait y établir un " pont de droit privé ? On a répondu qu'il ne le pouvait pas " (Liv. 43, loi 3ème, § 4). "Le législateur ne s'est pas contenté de " défendre ; il a prévu le cas de contravention à sa loi, et y a " pourvu : " Détruisez, dit le préteur, ce qui aura été fait dans " une rivière publique ou sur sa rive, ou ce que vous possédez " sur ce fleuve ou sur ses rives, ce qui en détériore ou en doit " détériorer la navigation " (Tit. 13, § 11). Rien n'a donc été négligé dans la législation romaine pour empêcher les obstructions, les obstacles qui pouvaient gêner en quelque manière la navigation dans les fleuves et les rivières publiques. Mais qu'entendait-on par rivière publique ? " Il faut d'abord dire " ce que c'est qu'une *rivière* et combien il y en a d'espèces. " La dénomination de *rivière* est déterminée par la largeur " ou par l'opinion de ses voisins. Il y a des rivières *perpétuelles* " et d'autres qui ne le sont pas ; *une rivière perpétuelle est* " *celle dont l'eau coule toujours ; une rivière non perpétuelle* " ou un *torrent* est celle dont les eaux ne coulent qu'en hiver. " Si cependant une rivière se dessèche pendant un été contre " son ordinaire, elle n'en sera pas moins une rivière perpétuelle. " Il y a aussi des rivières *publiques* et d'autres qui ne le sont " pas. Cassius dit qu'une *rivière perpétuelle est une rivière* " *publique ;* et cette opinion de Cassius, adoptée par Celse, pa- " raît assez juste " (Tit. 12, loi 1re, §§ 1, 2 et 3, p. 511). Notre Code Civil, art. 400, donne une définition différente de la rivière publique, en disant que : "Les chemins et routes à la charge de " l'Etat, les fleuves et rivières navigables et flottables et " leurs rives.... sont considérés comme des dépendances du " domaine public." Ainsi les rivières publiques sont celles que la loi déclare navigables et flottables. La rivière flottable est sur le même pied que la rivière navigable ; l'une et l'autre sont du domaine public, et les droits d'usage que les particuliers peuvent exercer dans les deux, sont réglés par les mêmes lois. Cet article de notre Code n'est pas introductif d'un droit nouveau. Les lois antérieures rangeaient dans le domaine public les rivières flottables comme les rivières navigables. " Dans " l'acception la plus étendue du mot, on comprend parmi les " rivières navigables celles qui sont flottables en trains, parce " que c'est là une espèce de navigation. Les trains se meuvent " à l'aide de moyens analogues à ceux qu'emploient les bateaux, " le halage, la voile, la rame, le gouvernail, et c'est ainsi que s'ex- " primaient les anciennes ordonnances. S'il y a une différence " spécifique entre les rivières navigables et les rivières flot- " tables, parce que, si les premières sont toujours susceptibles " d'être consacrées au flottage, un cours d'eau flottable n'est " pas toujours également propre à la navigation, des trains " pouvant aisément, à raison du moindre tirant d'eau, franchir

" des bas-fonds impraticables pour des bateaux, cette différence " n'influe pas sur la domanialité, qui dérive de la consécration " aux transports publics; et, quand l'art. 538 du Code Civil a " compris avec plus de précision que les *anciens édits*, parmi " les dépendances du domaine public, tous les *fleuves et rivières* " *navigables ou flottables*, ce n'est pas un droit nouveau qu'il " a introduit " (Daviel, Des cours d'eau, pp. 32, 33, 34, n° 35). Dans la note (2) à la page 33, il rapporte ce qui suit: " Navi-" gii appellatione etiàm rates continentur, quia plerùmque et " ratium usus necessarius est. Digeste, liv. 43, tit. 12, loi 1, " § 14. M. Nadaub de Buffon, *Des Usines*, tome 1, p. 245, mon-" tre par des citations empruntées aux auteurs latins, que le " mot *ratis* était indistinctement employé pour signifier un " *radeau* ou un bateau. Le premier *bateau* fut un *radeau* ". " Les rivières navigables ou flottables ont *toujours* fait partie " du domaine public " (1 Garnier, Régime des eaux, p. 44, n° 57). Proudhon, *Domaine Public*, vol. 3, p. 20, n° 686, cite un arrêt du Parlement de Paris du 26 février 1569, qui " ordonna à tous possesseurs de moulins ou forges d'avoir *pertuis* pour le *flottage du bois*, et permit aux marchands d'en faire faire où ils n'en trouveraient pas sur leur passage, avec défense à toute personne quelconque d'arrêter leurs marchandises dans le trajet." Les rivières navigables et flottables étant des voies publiques comme celles qui existent sur terre, pour les communications et les transports, devaient nécessairement faire partie du domaine public et être sous la juridiction immédiate de l'Etat qui seul, pouvait, au moyen de lois efficaces, en assurer l'usage aux particuliers. Aussi, trouvons-nous diverses ordonnances protectrices de la navigation sur ces rivières, portées à différentes époques et même bien avant celle des eaux et forêts, du mois d'août 1669. " Il n'a jamais été permis *dans aucun temps* de faire aucuns édifices sur les rivières navigables et flottables sans permission du Roi...." (De Gallon, Conférence de l'Ordonnance d'août 1669, vol. 2, p. 488). " Les rivières navigables et flottables ayant toujours été ran-" gées au nombre des choses du domaine public, et ayant été " comme telles, consacrées à l'usage général, il s'ensuit que " personne n'a jamais pu y établir de moulins sans l'autorisa-" tion expresse du gouvernement " (1 Garnier, p. 120, n° 117). Défense expresse est faite de ne rien construire sans cette permission, et ordre est donné de démolir ce qui aura été érigé contre la défense. Charles VI s'exprime comme il suit, dans une ordonnance du mois de mai 1413, art. 246: " Il est venu à " notre connaissance que depuis le temps déclaré en l'article " précédent, plusieurs seigneurs et autres ont fait plusieurs " gords et autres choses à prendre poisson, et aussi *plu-" sieurs isles et autres empêchements* ès rivières publiques

" de nostre royaume, pourquoy le poisson ne puet monter con-
" tremont icelles rivières, mais tout est arresté et pris en iceux
" gords ; et aussi par lesdits *empêchements* les cours desdites
" rivières en sont grandement empeschez.... Pourquoy nous
" avons ordonné que tous lesdits gords, isles et empeschements
" soient despeciez, ostez et adnullez reallement et de fait" (7e
" vol. du Recueil des anciennes lois françaises, par Jourdan,
" Decrusy et Isambert, p. 377). Par une ordonnance de François I, du 12 août 1545, il a été ordonné que les écluses de la rivière d'Isaac en la paroisse de Feugreal, et celles qui avaient été bâties sur les rivières de Loire, d'Ardres et Goulaines et autres ruisseaux entrant dans ladite rivière, seraient abattues avec défense de les refaire, et que la chaussée serait réduite aux bornes anciennes. [2 Foutanon, *Edits et Ordonnances*, pp. 1097, 1080.—2 de Gallon, p. 488]. Guénois, *Conférence des Ordonnances*, vol. 3, p. 319, cite plusieurs arrêts qui ordonnent d'ôter des embarras dans les rivières et de les nettoyer pour ne pas empêcher la navigation. Autre arrêt du Parlement de Paris du dernier juillet 1571, qui avait défendu à qui que ce soit, sous prétexte de privilèges, *moulins* et péages, d'empêcher les marchands en la voiture de leurs bois. 1 de Gallon, p. 909. Si permission avait été accordée de construire des ouvrages dans une rivière, il fallait toujours laisser un passage de 24 pieds pour les bateaux, etc. ; et si ces constructions étaient préjudiciables au commerce, elles pouvaient être enlevées. L'Ordonnance de 1415, celle de mai 1520 et celle d'octobre 1570 portent que les arches des ponts, voies, gords, pertuis et tous autres passages étant sur les rivières navigables, doivent avoir 24 pieds de large, pour passer et repasser les bateaux et marchandises, et défendent à qui que ce soit d'empêcher lesdites arches, voies, gords, pertuis et autres passages, soit en les rétrécissant ou autrement. 2 De Gallon, p. 288 ; Recueil des anciennes lois françaises, vol. 12, p. 176 ; 3 Guenois, Conf. des Ordonnances, p. 320. Le même Guenois, p. 319, rapporte un arrêt du 7 juillet 1565, qui enjoint à Jean Aubert, Bertrand Dubois, meuniers et consorts "de mettre leurs moulins
" dos à dos l'un de l'autre ; de manière que la voie navigable
" demeure toujours libre, franche et droite de la largeur de
" *huit toises* au droit fil et plus profond du cours de l'eau. Et
" leur fait inhibitions et défenses de planter, mettre ou afficher
" leurs gourds, anchres, duits, coulis et pieux dedans la ladite
" rivière de Loyre près ne loin de leurs moulins, et leur enjoint
" d'oster ceux qui y sont de présent." Nous trouvons ce qui suit dans une Ordonnance de Henri III, de janvier 1583, art. 18. "Nous ressouvenans semblablement... A quoi désirans
" pourveoir, enjoignons très-expressément auxdits grands-
" maîtres,. qu'en faisant leurs visites et chevauchées, ils aient à

" visiter lesdites rivières, levées, chaussées, moulins, pescheries, " ponts, hâvres marins... s'informer au vray de l'occasion du dé- " périssement et encomble desdites rivières.., et où il se trou- " vera lesdites ruines, démolitions en encomble être advenues " par la faute des habitants des lieux, les contraindront à les " réparer, remettre et entretenir en bon estat et deu. S'ils " cognoissent aussi lesdits *moulins* et pescheries estans sur les- " dites rivières, estre *préjudiciables* au trafic et commerce " d'icelles, et cause de les faire hausser et combler en aucun " endroits : les feront oster, détourner et lever, si mestier est..." (Recueil des anciennes lois françaises, vol. 14, pp. 534, 535). Enfin l'art. 42 du tit. 27 de l'Ordonnance des eaux et forêts, d'août 1669, 18 Isambert, p. 291, ne fait que résumer quelques dispositions des anciennes Ordonnances et des arrêts plus haut cités, en disant : " Nul, soit proprié- " taire ou engagiste, ne pourra faire moulins, bâtardeaux, " écluses, gords, pertuis, murs, plans d'arbres, amas de " pierres, de terre et de fascines, ni autres édifices ou empê- " chements nuisibles au cours de l'eau dans les fleuves et " rivières navigables et flottables... Enjoignons à toutes per- " sonnes de les ôter dans trois mois." D'après le droit anglais, d'accord en cela avec le droit français, le souverain est le propriétaire des rivières navigables dans les pays de son obéissance ; et l'on peut là, comme ici, ôter les embarras qui gênent la navigation. " The king is also, by his prerogative, the *primâ* " *facie* owner of the shores [that is the land which lies bet- " ween high and low water mark in ordinary tides], of the " seas and *navigable* rivers, and arms of the seas, within his " dominions" (Chitty, *On Prerogatives*, c. 11, sec. 1, p. 207). 2 Blackstone, ch. 16, pp. 261, 262. Phear, *On rights of water*, p. 41, and note [g]. " An obstruction in a public river is also a *nuisance*, and be dealt with as such" (Woolrich, *Law of waters*, ch. 9, p. 192). " The continuance of " wears was forbidden by Magna Charta. That Statute declares, " that " all wears from henceforth shall be utterly put down, " by Thames and Medway, and through all England, but only " by the sea coast." The annoyance, however, having been " renewed to some extent, it was enacted, that whereas the " common passage of boats and ships in the great rivers of " England be oftentimes annoyed by inhansing of gorces, " mills, wears, stanks, stakes, and kiddles, all such gorces, &c., " which be levied and set up in the time of King Edward, " the King's grandfather, and after, whereby the said " ships and boats be disturbed, that they cannot pass in " such river, as they were wont, shall be *cut and utterly* " *pulled down*, without being renewed...." (Ibid., p. 193). Il résulte clairement de toutes ces citations, que la défen-

deresse avait droit de descendre ses billots dans la rivière Blanche qui est flottable, sans qu'il fût permis à qui que ce soit de l'en empêcher, en obstruant le cours de cette rivière. Reste maintenant à s'enquérir si les demandeurs ont pu légalement faire les constructions dont ils parlent dans leur déclaration, c'est-à-dire la chaussée et le glacis, qui ont été brisés lors de la descente des billots de la défenderesse; et dans le cas qu'ils eussent ce droit, s'ils avaient laissé un passage suffisant pour le flottage des bois. Les demandeurs ne s'appuient d'aucune autorisation spéciale pour faire ces ouvrages: ils n'ont pour eux que l'acte des S. R. B. C., ch. 51, concernant l'amélioration des cours d'eau. Les témoins suivants nous disent depuis combien d'années les constructions des demandeurs existent. Talbot, Pellerin et Bergeron, environ 15 ans; Chavonelle, 17 à 18 ans, pense-t-il; Houle, au-delà de 18 ans; Charles Poirier et Jean-Bte Vigneau, une vingtaine d'années, et Cyr, 25 ans, disons 15 ans; il ne peut pas y avoir moins. L'acte a été sanctionné le 1er juillet 1856; il n'y a pas encore 13 ans; de sorte que les chaussée, glacis, &c., ont été érigés au-delà de deux ans avant cet acte, en contravention aux ordonnances plus haut citées qui défendaient expressément de les faire, en contravention à la loi qui défend les obstructions dans les rivières navigables et flottables. Ce Statut, qui n'est que pour l'avenir, légalise-t-il l'acte des demandeurs qui, en construisant, violaient la loi de la manière la plus directe? Ce chapitre 51 de nos Statuts autorise tout propriétaire à utiliser et exploiter tout *cours d'eau* qui borde, longe ou traverse sa propriété, en y construisant et établissant des usines, moulins, manufactures et machines de toute espèce, et pour cette fin, y faire et pratiquer les opérations nécessaires à son fonctionnement, tels que écluses, canaux, murs, chaussées, digues, et autres travaux semblables. Cette loi (S. du C. de 1856, 19 et 20 Vict., ch. 104) porte pour titre: "Acte pour " autoriser l'exploitation des *cours d'eau*." Le préambule " dit: "Vu que l'exploitation des *cours d'eau* serait un grand " moyen de prospérité pour le pays...." et l'acte ne parle que de *cours d'eau*. A-t-on entendu conférer les droits qu'on y trouve dans les grands cours d'eau; dans ceux du domaine public, comme les fleuves, les rivières navigables et flottables? Le Code Civil, art. 400, range les fleuves et les rivières navigables et flottables dans le domaine public, et on n'y trouve rien qui en autorise l'usage, autre que celui de la navigation et du flottage dont les particuliers ont toujours pu et peuvent jouir. Mais l'art. 503, en parlant de l'eau courante ne faisant pas partie du domaine public, dit que le propriétaire riverain peut s'en servir à son passage....sauf les dispositions contenues dans le ch. 51 des S. R. B. C. Ces deux articles rappro-

chés l'un de l'autre, n'indiquent-ils pas qu'on n'a pas entendu que le Statut donnât l'autorisation de construire des usines, moulins, etc., dans les fleuves et rivières navigables et flottables ? Si le législateur qui nous a donné cet acte (ch. 51) eût entendu permettre la construction de tels ouvrages dans ces fleuves et rivières, il est à présumer qu'il eût prescrit l'observance de quelques règles aux propriétaires ou occupants de ces constructions, pour la protection de la navigation et du flottage. Il n'a pas pu vouloir rendre ces propriétaires maîtres, en quelque sorte, des fleuves et rivières navigables et flottables qui sont du domaine public, au détriment de la navigation et du flottage. Il y aurait contradiction : l'un exclut l'autre. L'autorité souveraine peut bien accorder l'autorisation de construire certains ouvrages dans l s fleuves et les rivières du domaine public, mais elle impose toujours des conditions, elle prescrit des règles pour sauvegarder les droits des particuliers, les intérêts de la navigation et du commerce. Il est vrai que la 2e sect. de l'acte porte que : " Les propriétaires ou " fermiers desdits établissements resteront garants de tous " dommages qui pourront en résulter et être causés à autrui, " soit par la trop grande élévation des écluses ou autrement." L'on voit qu'il s'agit là surtout de l'effet que produit souvent une chaussée, une écluse, de faire refluer l'eau et d'inonder les terres en arrière ; ce qui occasionne quelquefois des dommages assez considérables. La navigation et le flottage des bois n'ont pas le temps d'attendre, pour passer, le résultat d'une poursuite en dommages ; ils ont besoin de chemins suffisants et libres : s'ils rencontrent des obstructions sur leur route, ils les renversent et passent. Dans l'hypothèse où ce ch. 51 de nos Statuts Refondus aurait autorisé la construction des ouvrages en question dans cette rivière flottable, ou à les y laisser, les demandeurs ont-ils livré un espace suffisant sur leur chaussée, pour donner passage aux bois de la défenderesse ? Les témoins nous disent que la glissoire n'avait qu'environ treize pieds de largeur ; onze pieds de moins, ou presque la moitié moins que celle de vingt-quatre pieds prescrite par plusieurs des ordonnances plus haut citées. Cette glissoire n'était donc pas conforme à la loi ; elle était trop étroite, et par là même insuffisante. Il est possible que les demandeurs n'auraient pas éprouvé les dommages dont ils se plaignent, s'ils avaient livré un passage de 24 pieds avec un *boom* conducteur pour y correspondre. C'était à eux à employer les moyens propres à ne pas gêner la défenderesse dans l'exercice de son droit incontestable de passer son bois, et à protéger leur propriété. Ils n'ont pas pris ses moyens ; ils ont désobéi à la loi ; comment donc peuvent-ils se plaindre ? Leur demande doit être écartée. La solution des questions de droit étant donnée dans le sens

de la défense, la Cour pourrait se dispenser de s'occuper du reste des témoignages, pour voir si les hommes de la défenderesse pouvaient ou non, agir autrement qu'ils n'ont fait, et éviter les dommages dont les demandeurs se plaignent : cependant il peut être important de faire cet examen. Il est parfaitement établi que, lorsque les bois de la défenderesse descendaient, et qu'ils approchaient du moulin des demandeurs, il est survenu une crue extraordinaire des eaux de la rivière, telle qu'on n'en avait jamais vue, laquelle a fait partir des ponts dont les débris augmentés d'une quantité d'arbres et *d'arrachis*, sont venus se mêler aux billots de la défenderesse, et ont rendu la conduite des bois plus difficile ; qu'on a ouvert le *boom* barrant la rivière à quelque distance de la chaussée du moulin, pour conduire les billots jusqu'à la glissoire sur cette chaussée, au moyen d'un *boom* conducteur, prenant à l'un et allant à l'autre ; que le *boom* avait été ouvert d'une grandeur à correspondre avec la glissoire, et que le passage formé par ce *boom* conducteur, avait une largeur de dix ou douze pieds. Jean-Baptiste Vigneau et Hubert Doucet disent qu'ils étaient présents lorsque la glissoire est partie ; qu'il n'y passait pas alors trop de billots, dit Vigneau ; 5 ou 6 à la fois, dit Doucet ; que c'est la force de l'eau, et non le *passage* des billots, qui a fait partir la glissoire, dit Doucet ; qu'elle est partie par la confusion d'eau et les bois et les billots, dit Vigneau. Il n'y a pas de contradiction ici, et la différence qui paraît exister entre les deux versions, peut aisément se concilier. Le *passage* seul de 5 ou 6 billots à la fois n'aurait pas suffi pour causer l'accident, mais ces quelques billots poussés avec force par un volume d'eau considérable, ont pu y contribuer. Une partie du glacis et de la chaussée a été brisée ensuite, et voici ce que Doucet nous en dit : " il y avait un *remous* en bas de la chaussée d'une force extraordinaire qui retenait une partie des billots passés et les faisait tourner et frapper sur la chaussée et la glissoire, et la chaussée a pu en être affectée, mais on ne pouvait empêcher cela, quand même nous aurions été un bien plus grand nombre d'hommes ; 3 ou 4 hommes sur un billot ne pouvant pas même l'empêcher de frapper." Moïse Desilets dépose que lorsqu'il est allé à la chaussée après le départ de la glissoire, les demandeurs y étaient. Jean-Baptiste Vigneau nous dit que l'un des demandeurs, Béliveau, s'est tenu à la chaussée presque tout le temps ; qu'après le départ de la glissoire, Béliveau lui a dit que puisqu'il n'y avait plus de glacis on pouvait laisser aller le *boom* et faire passer les billots sur toute la largeur de la rivière, et qu'alors le *boom* a été ouvert tout à fait. Lorsque la glissoire s'est brisée, ça n'a pas fait grand bruit ; ensuite tout est parti en bloc, et on ne pouvait voir comment, parce que l'eau couvrait tout. Les billots sont passés sur la chaussée en plus

grande quantité, après l'ouverture du *boom*, dit Doucet. Plusieurs témoins déposent que la défenderesse n'avait pas assez d'hommes à la chaussée pour y faire passer ses billots, tandis que quelques-uns disent le contraire ; mais est-ce que les demandeurs eux-mêmes ne devaient pas fournir le nombre d'hommes nécessaire pour empêcher qu'elle ne fût gênée dans ses opérations, et pour protéger leur propriété ? qui causait l'embarras dans le cours de cette rivière flottable où la défenderesse avait droit de passer son bois sans encombre. Ceux qui conduisaient, ceux qui agissaient sous la conduite des premiers, paraissent avoir fait leur devoir. On ne remarque aucune négligence, aucune imprudence, bien que les demandeurs se soient efforcés de prouver, mais sans succès, que le conducteur n'était pas un homme entendu dans le flottage des bois. Il faut dire qu'il y a contrariété dans la preuve ; car si d'un côté Jean-Baptiste Vigneau et Hubert Doucet prouvent que le *boom* n'a été ouvert tout à fait qu'après le départ de la glissoire et d'une partie de la chaussée et du glacis, et que c'est alors que les billots ont passé sur toute la largeur de la rivière, il en est d'autres qui disent que c'est l'accumulation des billots sur la chaussée qui a causé les dommages, parce qu'on les y envoyait en trop grande quantité. Dans ce conflit de preuve, la cour a dû s'en rapporter plus particulièrement aux témoignages de Vigneau et de Doucet qui travaillaient à faire passer les billots et qui par là même se trouvaient dans la meilleure position possible pour voir et savoir ce qui s'y passait, tandis que les témoins qui déposent différemment ne paraissent avoir été là que comme spectateurs et n'ont pas été à même de voir si bien que ceux qui s'occupaient activement du passage des bois. Les témoignages de Vigneau et de Doucet sont corroborés en grande partie par ceux de Jean Arseneau et Jean Ouellet,— Arseneau était présent quand le grand *boom* a été ouvert pour faire passer le bois. L'*échappe* ou *gueule* de ce *boom* pouvait être ouverte d'une dizaine de pieds, et l'on conduisait les billots par un petit *boom* qui allait à l'entrée de la glissoire. Tant que la glissoire n'a pas été partie, les billots descendaient d'une certaine façon, par 5 ou 6, 7 ou 8, de manière à ne pas faire tort à cette glissoire. Il n'était pas présent lorsqu'elle est partie. Tant qu'il est resté là, l'on passait les billots comme dans toutes les autres chaussées et les travaux étaient bien conduits ; il y avait assez de monde pour faire passer les billots. Aussitôt que le passage de la chaussée a été commencé comme il faut, il, le témoin a continué à descendre pour conduire les billots. Tel que c'était parti ça allait bien ; les hommes étaient tous placés à leurs ouvrages, et si rien n'a été dérangé après son départ, ce n'est

pas le passage des billots qui a pu faire partir la glissoire. Ouellet est arrivé avant l'ouverture du *boom* d'en haut. Ce *boom* était ouvert pas mal large pour faire passer les billots comme il faut: il y avait un petit *boom* pour faire passer les billots à la tête de la glissoire; pendant qu'il est demeuré là les billots passaient par 4, 5 ou 6 à la fois, de manière à ne pas faire de dommage à la glissoire ni à la chaussée. Ces deux témoins étaient employés à la descente des billots. Vigneau dit, comme il a déjà été rapporté, que la glissoire n'a pas fait grand bruit lorsqu'elle est partie; qu'ensuite le reste est parti en bloc et qu'on ne pouvait voir comment, parce que l'eau couvrait tout. Ceci peut servir à expliquer certains témoignages dans lesquels on trouve que l'accumulation des billots sur la chaussée, l'a fait partir et a causé les dommages. Ces témoins qui n'ont probablement pas entendu de bruit au départ de la glissoire et du reste, et qui n'ont pas vu partir ces ouvrages que l'eau couvrait, ont cru que les dommages avaient été causés par les billots qu'ils voyait passer sur toute la largeur de la chaussée, tandis qu'alors, on ne faisait passer les billots ainsi, que parce que les ouvrages étant partis, il n'y avait plus rien à protéger. Ainsi, en supposant que le passage pour les billots fût suffisant et que la défenderesse dût s'en contenter, il ressortirait de la preuve que la glissoire, la chaussée et le glacis auraient été brisés par cas fortuit occasionné par la crue extraordinaire des eaux de la rivière Blanche; de sorte que la défenderesse ne serait pas responsable des dommages causés aux demandeurs. "La perte d'une chose qui périt par " cas fortuit, doit régulièrement être supportée par le propriétaire, suivant la règle, *res perit domino*" (3 Répertoire de " Merlin, v° Cas. § 7, p. 368). Lorsqu'une crue subite des " eaux entraîne les trains de bois, les propriétaires sont autorisés à reprendre leur bois partout où ils se trouvent, sans " payer aucune indemnité pour les dommages qui ont pu en " résulter, attendu que c'est là une force majeure dont il " serait injuste de les rendre responsables. Beaucoup d'anciens édits et de sentences du Bureau de la ville de Paris, " qui sont rapportés par M. Dupin dans son Code des bois et " charbons, ont très justement statué ainsi toutes les fois que " l'occasion s'est présentée" (1 Daviel, cours d'eau, p. 315, n° 310).

"La cour, attendu, 1° que les demandeurs réclament trois cent cinquante piastres de dommages qu'ils disent que la défenderesse leur a causés, en mai 1867, en laissant, par maladresse ou négligence, accumuler, sur la chaussée de leur moulin, dans la rivière Blanche, au canton d'Aston, une grande quantité de ses billots qu'elle faisait descendre dans

cette rivière, lesquels furent précipités violemment et en grande quantité à la fois sur le glacis dont ils brisèrent et emportèrent, dans leur chute, une grande partie, ainsi que de la chaussée, faisant une cavité au bas du glacis d'une étendue de vingt-cinq pieds sur cinquante et d'une profondeur d'environ dix pieds. 2° Que la défenderesse rencontre cette demande par une exception par laquelle, après avoir nié les faits énoncés en la déclaration, elle plaide, 1° que son bois a été descendu avec toute la diligence et la prudence possibles et en la manière accoutumée; que si la chaussée a été brisée et endommagée, ce n'est pas dû à aucune faute ou négligence de sa part, mais plutôt à la force majeure causée par une crue extraordinaire d'eau survenue alors, et qui a pu occasionner des dommages dont cependant elle n'est pas responsable. 3° Que la rivière Blanche en question est flottable et qu'on y descend du bois de commerce depuis vingt ans passés. 4° Que les demandeurs n'ont aucun droit de barrer la rivière de manière à gêner la descente des bois ou à les faire accumuler; qu'il était de leur devoir d'empêcher l'accumulation sur leur chaussée et que si la chaussée a été endommagée par cette accumulation, c'est dû à leur propre négligence. Considérant, 1° qu'il est établi, par la preuve, que la rivière Blanche sus-mentionnée est flottable et qu'on y descend des bois depuis bien des années; qu'elle est conséquemment dans le domaine public, suivant l'article 400 du Code Civil et les lois antérieures, et que tout particulier peut s'en servir pour y flotter ses bois; 2° que les demandeurs n'avaient aucun droit d'obstruer cette rivière en y construisant, comme ils l'ont fait, une chaussée et un glacis qui la barraient d'un bord à l'autre, sans en avoir obtenu l'autorisation d'une autorité compétente, autorisation qu'ils ne prétendent pas leur avoir été accordée. 3° Que, par l'acte des Statuts Refondus pour le Bas-Canada, chapitre 51, la Législature n'a pas entendu autoriser et n'autorise pas ces constructions dans les rivières navigables et flottables, mais seulement dans celles qui ne sont pas dans le domaine public, comme il ressort du rapprochement des articles 400 et 503 du Code Civil et des lois antérieures, et parce que, si elle avait eu l'intention de les permettre dans les rivières navigables et flottables, elle n'aurait pas manqué de prescrire, dans ce même acte, des règles et conditions protectrices de la navigation et du flottage des bois, ce qu'elle n'a pas fait; que d'ailleurs les constructions des demandeurs ont été érigées au-delà de deux ans avant la passation de l'acte qui n'est pas pour l'avenir, en violation des lois alors existantes qui défendaient l'établissement de ces ouvrages dans les rivières navigables et flottables, comme étant des obstructions causées par

les demandeurs à la navigation et au flottage; 4° Qu'en supposant que cet acte autorisât le maintien et la conservation de ces constructions, les demandeurs ne se sont pas conformés à la loi, et nommément aux ordonnances de Charles VI du mois de février 1415 et de François I du mois de mai 1520, qui enjoignent de laisser un espace libre de vingt-quatre pieds de largeur, dans les constructions qui sont faites avec autorisation dans les rivières navigables et flottables, pour les passages des nefs, bateaux et marchandises, les demandeurs n'ayant fait une glissoire dans leur chaussée que d'environ treize pieds de largeur, ce qui était trop étroit et insuffisant; 5° Qu'en supposant, enfin, que ce passage fût suffisant et que la défenderesse dût s'en contenter, il ressort de la preuve que les constructions des demandeurs ont été brisées et endommagées par cas fortuit occasionné par une crue extraordinaire des eaux de ladite rivière, survenue lorsque les billots de la défenderesse descendaient et qu'ils approchaient de ces constructions et y arrivaient, de sorte que la défenderesse n'est pas responsable de ces dommages. Pour ces motifs, déboute les demandeurs de leur action, et les condamne aux dépens. (1 *R. L.*, p. 720)

M. ABRAHAM-L. DESAULNIERS, avocat des demandeurs.

MM. MCDOUGALL and HOULISTON, avocats de la défenderesse.

EXECUTION DES JUGEMENTS.—SAISIE-ARRET.—CAPIAS.—DESISTEMENT.

COUR SUPÉRIEURE, Arthabaska, 1er septembre 1869.

Coram POLETTE, J.

OCTAVE GAUDET *vs* NARCISSE LALIBERTÉ.

Jugé: 1° Que le créancier peut cumuler contre son débiteur les contraintes et les différents moyens d'exécution donnés par la loi, pour être payé d'un jugement rendu.

2° Que celui qui a été débouté d'une demande ou d'une procédure, ou qui s'en est désisté, peut la recommencer avant d'avoir payé les frais de la première, et sa seconde demande ou procédure ne sera pas déboutée pour cela, mais la partie adverse pourra, sur motion à cet effet, arrêter les procédés jusqu'à ce que le demandeur ait payé les frais de la première demande ou procédure, ou faire renvoyer la seconde demande ou procédure, si les frais de la première ne sont pas payés dans un délai fixé par la cour.

3° Que le demandeur sur saisie-arrêt avant jugement, ou sur *capias*, n'est pas tenu de faire signifier la déclaration au défendeur lui-même, ou au greffe, mais peut en laisser au greffe une copie pour le défendeur et faire constater tel dépôt sur l'original par le protonotaire ou le greffier.

L'Honorable juge POLETTE : Requête demandant à faire annuler le bref de *Capias ad respondendum*, en vertu duquel Laliberté a été arrêté et écroué dans la prison commune de ce district. Cette requête contient divers moyens que la cour va examiner successivement : 1° Le premier consiste à dire que les faits allégués en l'affidavit sur lequel est décerné le bref, sont faux. La créance et ses causes sont amplement prouvées par un jugement produit dans l'instance. Reste la question de savoir si Laliberté était sur le point de laisser la province, dans l'intention de frauder ses créanciers en général, et Gaudet en particulier. Il est assez rare de pouvoir obtenir une preuve bien directe de tels faits. Celui qui veut frauder ses créanciers ne fait pas les choses au grand jour, il se cache, et ce n'est, la plupart du temps, que par ses actes et ses indiscrétions, que l'on parvient à découvrir ses intentions. Ici, Laliberté a assez parlé et agi pour qu'on ne puisse pas se méprendre sur ce qu'il entendait faire. Ferdinand Boulanger rapporte, qu'en septembre dernier, il eut une conversation avec Laliberté qui lui dit, qu'il allait aux Etats-Unis, vers la Toussaint. Louise Hardy dépose, que, dans le courant de juillet dernier, Laliberté lui dit qu'il avait quelque chose à faire ici, qu'aussitôt qu'il aurait gagné de l'argent, il irait aux Etats-Unis, et y ferait revenir sa famille, s'il trouvait cela convenable ; qu'il était content de partir pour débarrasser les gens de Ham, et aussi pour être débarrassé d'eux. Jean Cloutier jure que, le 13 juillet dernier, il partait avec Laliberté pour les Etats-Unis, si Goodhue les engageait. Laliberté lui dit que, s'il faisait bien ses affaires, il monterait avec sa famille pour y demeurer ; que, la veille de l'arrestation de Laliberté, celui-ci lui dit qu'il montait aux Etats-Unis, sans dire quand ; mais il dit : "Je vais monter aux Etats-Unis," et le témoin comprit que ce devait être prochainement. Ainsi, il est bien prouvé que Laliberté a dit, même la veille de son arrestation, qu'il partait pour les Etats-Unis avec l'intention d'y demeurer, d'y emmener sa famille, s'il faisait bien ses affaires. Il voulait débarrasser les gens de Ham, et en être débarrassé. N'était-ce pas là bien exprimer son intention de laisser la province ? que faudrait il donc de plus ? Etait-ce dans le but de frauder ses créanciers, et plus particulièrement Gaudet ? Ses paroles et ses actions ne le démontrent que trop. Il est prouvé, par plusieurs témoins, qu'il a une terre valant au-delà de $200, et un mobilier valant $40, et, cependant, il n'hésite pas à jurer qu'il ne vaut pas £10 sterling, sur une requête qu'il présente pour obtenir des aliments pendant son incarcération. Peut-on croire qu'un homme qui veut soutirer de l'argent de son créancier, au moyen d'un parjure, qui est si peu scrupuleux sur le serment, va prendre des moyens

honnêtes pour parvenir à payer son créancier ? ne doit-on pas, au contraire, être convaincu qu'il aura recours à tous les moyens malhonnêtes possibles, pour s'exempter de payer ? Il ne s'arrête pas en si beau chemin : il forme opposition pour faire annuler la saisie de sa terre, sous prétexte qu'on aurait dû commencer par saisir son mobilier, qui vaut $40, disent les témoins ; sur cette somme, il faut défalquer $6 prix d'une taure vendue, laissant $34 valeur du restant ; et en quoi consiste ce restant ? en une vache estimée par plusieurs témoins, à $20, quatre moutons, herse, charrue, et des meubles dans sa maison, nous dit le témoin François Tardif ; or, la vache, les 4 moutons, les herse et charrue, poêle, tuyau, table, chaises, lits, etc., sont exempts de saisie par l'article 556 du Code de Procédure Civile, et Laliberté n'a pas autre chose ; cependant il se plaint qu'on n'a pas saisi ce petit mobilier insaisissable. Ceci ne prouve-t-il pas encore sa malhonnêteté, sa détermination d'employer tous les moyens d'iniquité à sa disposition pour faire perdre son créancier ? Mais il ne se contente pas d'agir ; il parle aussi. Calixte Provencher rapporte ce qui suit : " Je lui ai demandé s'il n'était pas vrai qu'il devait faire " une opposition à fin d'annuler la saisie que le demandeur " (Gaudet) avait faite de sa terre, etc. ; il m'a répondu que " cette opposition à fin d'annuler était déjà faite, *et que Gau-* " *det, le demandeur, n'aurait pas sa terre.* Je lui ai alors dit " que c'était trompant, qu'il pourrait bien parvenir à l'avoir ; " il m'a alors répondu : " Je suis bien certain qu'il ne l'aura " pas, parce que je *l'ai déjà vendue*, et celui qui l'a saura bien " la défendre avec lui." Louis Guertin nous dit, en parlant " de Laliberté : " Il m'a dit, depuis qu'il est en procès avec " Gaudet, qu'il voulait garder sa terre pour élever sa famille : " *qu'il jouerait avant qu'on la lui ôtât.*" Avec une telle preuve sous les yeux, est-il possible de s'empêcher de croire que Laliberté avait l'intention de laisser la province dans l'intention de frauder Gaudet ? Ainsi, ce moyen de requête doit être mis de côté. Passons au second moyen : 2° Laliberté prétend que Gaudet, ayant choisi le mode d'exécution par voie de saisie de sa terre, ne pouvait pas faire décerner comme il l'a fait, de *capias*, avant de connaître le résultat de la saisie. L'emploi du bref de *capias* n'est pas une voie d'exécution d'un jugement ; c'est seulement un moyen d'empêcher le débiteur de laisser la province, et se ménager par là une chance de se faire payer. Il n'est pas plus une voie d'exécution que ne l'est la saisie conservatoire, l'arrêt simple, la saisie-gagerie par exemple. Mais, en supposant que le bref de *capias* fût un moyen d'exécution du jugement, Gaudet aurait eu le droit de s'en servir, parce que la loi permet au créancier de cumuler les contraintes. Papon, arrêts, liv. 11, tit. 5, arrêt 43, p. 1027,

nous dit dans son vieux langage: " La loi, etc., qui veut qu'a-
" vant de toucher aux immeubles, l'on doit exploiter les
" meubles d'un débiteur, et la loi, etc., qui veut qu'eslisant
" une voye, l'on est forclos de l'autre, n'ont lieu en France pour
" exécutions d'obligations personnelles; mais, au contraire,
" par l'Ordonnance du Roy François, de l'an 1539, art. 74, l'on
" peut d'entrée, sans parquérir ni discuter, s'adresser aux
" immeubles, *immo* peut le créancier prendre et saisir les
" immeubles à lui généralement et autres spécialement hypo-
" théqués, et par même moyen peut saisir les meubles, droits,
" noms et actions, et avec iceux la personne du débiteur,
" prendre le charretier, le fouet et la charrette, et cumuler plu-
" sieurs exécutions ensemble, ou bien l'une après l autre, et ne
" cesser jamais, n'y laisser son débiteur, sa personne, ses
" biens meubles et immeubles, qu'il ne soit payé, afin de le
" contraindre à payer plus tôt: et ainsi a été jugé par infinis
" arrêts de la Cour de Parlement." Voir aussi: 1 Pigeau, édition de 1787, p. 605. 1 Couchot, Praticien Universel, p. 475, édition in-12: " Les poursuites et contraintes par corps n'empêchent
" les saisies, exécutions et ventes des biens de ceux qui
" sont condamnés." Ord. de 1667, tit. 34, art. 13. Sur quoi Jousse (vol. 2, p. 364) observe: " Ainsi un créancier peut sai-
" sir les biens de son débiteur en même temps qu'il le fait
" emprisonner. Il a deux sûretés au lieu d'une." Mais nous avons une loi du pays qui décide la question en termes formels: l'art. 554 du Code de Procédure Civile, s'exprime comme il suit: " Le créancier peut exercer *en même temps les*
" *différents moyens d'exécution* que la loi accorde." 3° Laliberté se plaint, par son troisième moyen de requête, que Gaudet a fait décerner le second bref de *capias* sans payer au préalable les frais d'un premier bref qui avait été cassé avec dépens contre lui. Il fonde cette prétention sur l'acte des S. R. B. C., ch. 82, s. 25. Les articles 450 et 453 du Code de Procédure Civile reproduisent la partie de cette section qui a rapport à notre question, ainsi qu'il suit: " Art. 450:— " Une
" partie peut, en tout temps, avant jugement, se désister de sa
" demande ou procédure, à la condition de payer les frais." Art. 453: " La partie qui s'est désistée ne peut recommencer
" avant d'avoir préalablement payé les frais encourus par la
" partie adverse sur la demande ou procédure abandonnée." Cette disposition serait, en certains cas, d'une rigueur extrême, et aurait pour effet de faire perdre un bon droit, si l'on se permettait de l'étendre à des cas analogues à celui qu'elle présente, et si on les suivait à la lettre dans sa partie prohibitive, comme il va être démontré par l'exemple suivant: Un débiteur va laisser la province: il est prêt à partir, son créancier qui l'apprend, a cependant le temps de le faire arrêter

sur *capias*. Ce cas n'est pas rare : il arrive presque journellement ; mais dans la presse du moment l'avocat, en préparant l'affidavit, commet une erreur qui est cause que le bref est cassé avec dépens, et le débiteur remis en liberté. Le créancier, qui se trouve sans argent pour payer ces dépens au moment du prononcé du jugement de libération, sera donc condamné à voir partir son débiteur, sans pouvoir le faire arrêter sur un autre bref, et à perdre sa créance ? Mais supposons que le créancier soit muni de la somme nécessaire ; son débiteur, qui avait fait ses préparatifs de départ, aura-t-il la complaisance d'attendre qu'on ait préparé le mémoire des frais, qu'on aille les lui offrir, qu'on prépare ensuite l'affidavit, le bref de *capias* pour remettre au shérif et que celui-ci n'ait qu'à se présenter pour l'exécuter ? Non, le législateur n'a pas entendu soumettre à une telle prohibition, la procédure qui exige une grande célérité. Il ne parle que de la demande, de la procédure dont la partie se désiste volontairement. Ici, il n'y a pas de désistement, la procédure a été soumise au juge, soutenue d'un côté, contestée de l'autre, et ensuite jugée. Il n'a pas entendu non plus que ses expressions fussent prises dans un sens trop absolu, que sa disposition fut suivie à la lettre. Il n'a pas interdit à la partie le droit d'introduire de nouveau sa demande, sa procédure avant de payer ; il a seulement voulu qu'après cette introduction, elle ne pût procéder sans acquitter les premiers frais, ainsi qu'il s'est toujours pratiqué lorsqu'un demandeur s'est vu débouté de son action, sauf à se pourvoir, et qu'il a recommencé. Tel est, dans l'opinion de la Cour, dans quel esprit ces articles sont conçus. Ainsi entendus, ils ne violent aucunement les règles de la justice et de l'équité, et ils ne font tort à personne. Gaudet n'a pas beaucoup tardé à acquitter ces frais. Le bref est émané le 14 octobre, et Laliberté admet, dans sa réplique à la défense au fond, qu'ils lui ont été payés le 16 ou 17, avant même le jour du rapport du bref. S'il en avait été autrement, Laliberté aurait pu obtenir un ordre de paiement, sous un court délai, et faire casser ce second bref, s'ils ne lui étaient pas payés dans le délai prescrit. Ce moyen de requête est donc sans valeur. 4° Le quatrième et dernier moyen, est que Gaudet ne lui a pas fait signifier de déclaration spécifiant les causes d'action contre lui, soit à lui-même ou au greffe, soit avec le bref, ou dans les trois jours de la signification de ce bref. L'on ne sait trop ce que veut prétendre Laliberté, lorsqu'on trouve dans le dossier une telle déclaration avec un certificat du député protonotaire au dos, constatant qu'elle a été produite le 16 octobre, avec copie pour le défendeur [Laliberté] ; c'était deux jours après la signification du bref. Entend-il dire que Gaudet aurait dû la faire signifier par un huissier, avec certificat de signification ? Le

Code de Procédure Civile, art. 804, ne l'exige pas. Il se contente de dire qu'il suffit d'en *laisser* une copie à lui-même (au défendeur) ou au greffe du tribunal, dans les trois jours qui suivent la signification du bref. Gaudet en a laissé une copie au greffe, sans la faire signifier par un huissier, et, en cela, il s'est conformé à la pratique suivie dans plusieurs tribunaux, sinon dans tous. Ce dépôt fait au greffe, par le procureur de la partie, ou par un clerc, avec certificat de production du député protonotaire, comme celui que nous avons, vaut bien la signification faite par un huissier qui en donne son certificat ; le mode suivi est aussi sûr que l'autre. La Cour ne peut donc pas accueillir ce moyen. Laliberté a fait motion pour rejeter les 1er et 5ème articles de l'articulation de faits de Gaudet comme étant inadmissibles, attendu que les faits y mentionnés ne sont pas allégués dans la défense de Gaudet à la requête. Cette articulation de faits est produite le 17 novembre ; Laliberté donne sa réponse le même jour, et répond d'une manière directe aux deux articles dont il se plaint, sous réserve, dit-il, de leur légalité. Les parties procèdent à leur enquête de part et d'autre, et la terminent le 13 février. Gaudet inscrit le 15 du même mois pour audition finale au mérite, pour le même jour, du consentement de Laliberté, et ce n'est que le lendemain, 16, que la motion est faite, sans qu'il apparaisse que Laliberté ait donné avis de son intention de la faire, soit lorsqu'il a répondu à l'articulation de faits de son adversaire, soit après. Sous ces circonstances, la Cour est d'opinion que le silence gardé par Laliberté jusqu'à l'enquête, même jusqu'à l'audition de la cause, est un acquiescement aux deux articles en question, et qu'il a attendu trop tard pour s'en plaindre.

" La Cour, attendu, 1° Que, par jugement prononcé par cette Cour, le sept mai 1868, dans une cause sous numéro 748, dans laquelle Narcisse Laliberté était demandeur contre Octave Gaudet, défendeur, Laliberté fut débouté de son action, et condamné aux dépens d'icelle envers Gaudet, lesquels dépens furent depuis taxés à la somme de $88.78. 2° Que le 14 octobre dernier, Gaudet fit émaner de cette Cour, sur son affidavit fourni à cette fin, un bref de *capias ad respondendum* contre Laliberté, pour le montant desdits dépens, et que ce dernier fut, en conséquence arrêté et écroué dans la prison commune de ce district, le même jour : 3° Que le quatorze novembre dernier, Laliberté présenta une requête, pour faire annuler le bref de *capias*, fondée sur les moyens suivants, savoir : 1° Que les faits mentionnés dans l'affidavit de Gaudet sont faux ; 2° Qu'en supposant qu'il eût l'intention de partir, et que, de fait, il fût parti pour les Etats-Unis, ce départ n'aurait pas privé Gaudet de son recours contre lui, atten-

du qu'avant de faire émaner le bref de *capias*, Gaudet avait fait décerner un bref de *fieri facias de terris*, et saisir sur lui, Laliberté, en vertu de ce dernier bref, un immeuble valant au-delà de cinquante louis ; que la saisie de cet immeuble est encore pendante, et que Gaudet, ayant choisi son mode de procédure contre lui, par voie de saisie réelle, ne pouvait faire émaner le bref de *capias* avant de connaître le résultat de cette saisie, de la vente et de la distribution des deniers en provenant ; 3° Que, le ou vers le onze octobre dernier, Gaudet avait fait émaner un premier bref de *capias* contre lui, Laliberté, pour les mêmes dépens, sur un affidavit alléguant les mêmes moyens que ceux énoncés dans l'affidavit ci-dessus premièrement mentionné, lequel bref fut cassé le quatorze du même mois, avec dépens contre Gaudet, depuis taxés à neuf piastres et cinquante centins, et qu'il a fait émaner le second bref de *capias* avant de payer le montant de ces dépens qui auraient dû être acquittés avant l'émanation de ce dernier bref ; 4° Que Gaudet ne lui a pas fait signifier de déclaration spécifiant les causes d'action contre lui, Laliberté, soit à lui-même ou au greffe, soit avec le bref de *capias*, ou dans les trois jours de sa signification ; 4°. Que, le seize du mois de novembre dernier, Gaudet plaida à la requête, 1° Par une réponse en droit, prétendant que les trois derniers moyens sus-mentionnés et plaidés par la requête, ne sont pas fondés en droit, et 2° Par une défense au fond, par laquelle il nie les faits allégués en la requête, et affirme avoir payé à Laliberté les frais encourus sur le premier bref de *capias* cassé le quatorze octobre dernier. 5° Que, le seize novembre dernier, Laliberté a produit une réplique générale à la réponse en droit, et une réplique à la défense au fond, par laquelle il admet avoir reçu les dépens sur le premier bref de *capias*, mais le seize ou dix-sept octobre seulement, et après l'émanation du second bref. 6° Que, le dix-huit mai dernier, Gaudet a déduit de sa demande de dépens sus-mentionnés, la somme de quarante-sept piastres et cinquante centins, avec laquelle il compense pareille somme qu'il devait à Laliberté, laissant une balance redue de quarante-une piastres et vingt-huit centins. Faisant droit d'abord sur ladite motion : Considérant que Gaudet a produit son articulation de faits le dix-sept novembre dernier, et que, le même jour, Laliberté y a répondu, sans prévenir Gaudet, par motion, avis de motion, ou autrement, qu'il entendait demander le rejet des premier et cinquième articles de l'articulation de faits de Gaudet, auxquels il a répondu d'une manière directe ; que les parties ont terminé leur enquête de part et d'autre, et que, le quinze février dernier, Gaudet a, du consentement de Laliberté, inscrit pour audition finale au mérite pour le même jour, tandis que la

motion n'a été faite et présentée que le lendemain, seize février ; qu'ainsi le silence de Laliberté jusqu'à cette dernière date, relativement à ces articles, est un acquiescement à iceux, et ne lui permet plus de demander de les mettre de côté : rejette ladite motion de Laliberté, et le condamne aux dépens d'icelle envers Gaudet : Et, faisant droit sur la requête et sur le bref de *capias ad respondendum :* Considérant, 1° Que Gaudet a prouvé les faits essentiels allégués en son affidavit pour obtenir le bref de *capias ad respondendum ;* de sorte que le premier moyen plaidé par la requête n'est pas fondé ; 2° Que le droit d'obtenir un bref de *capias* n'est pas une voie donnée au créancier pour faire exécuter un jugement qu'il a obtenu, mais seulement un moyen d'empêcher son débiteur de laisser la province, et par là, avoir plus de chance de s'en faire payer ; qu'ainsi le bref de *capias* émané en second lieu, n'était pas une voie d'exécution du jugement obtenu par Gaudet contre Laliberté ; mais que, quand même ce bref serait un moyen d'exécution du jugement, Gaudet avait droit de l'obtenir, dans le temps que la saisie réelle mentionnée en la requête, était pendante, suivant l'article 554 du Code de Procédure Civile, qui permet au créancier d'exercer en même temps les différents moyens d'exécution que la loi accorde ; 3° Que la loi n'obligeait pas Gaudet de payer les frais sur le premier bref de *capias* avant de faire émaner le second ; et que, d'ailleurs, ces frais ont été payés avant le rapport en Cour du second bref de *capias*, ainsi que Laliberté le reconnaît par sa réplique à la défense au fond de Gaudet, et par ses réponses à l'articulation de faits de ce dernier : 4° Que Gaudet a produit et laissé au greffe de cette Cour, dans les trois jours de la signification du bref de *capias*, une déclaration ou demande libellée, avec une copie pour Laliberté, conformément à l'article 804 du Code de Procédure Civile ; qu'ainsi, la requête n'est pas fondée en fait ni en droit : renvoie et rejette la requête de Laliberté présentée le quatorze novembre dernier, à l'encontre du bref de *capias ad respondendum*, émané le quatorze octobre dernier ; déclare le bref de *capias* bon et valable, au montant de la somme de $41.28, balance restant due à Gaudet, et condamne Laliberté aux dépens sur le bref de *capias*, et sur la requête, envers Gaudet. (1 *R. L.*, p. 747)

E.-L. PACAUD, pour le demandeur.

EUGÈNE CRÉPEAU, pour le défendeur.

VENTE DES TERRAINS AFFECTES AUX TAXES MUNICIPALES.— ENREGISTREMENT.

COUR SUPÉRIEURE, Arthabaska, 23 mai 1870.

Coram POLETTE, J.

J.-BTE CAYA, demandeur, *vs* L.-G. PELLERIN, défendeur, *et* ledit L.-G. PELLERIN, demandeur en garantie, *vs* ALEXANDRE HOULE, défendeur en garantie, *et* ledit ALEXANDRE HOULE, demandeur en arrière garantie, *vs* RUBEN-M. HART *et al.*, défendeurs en arrière garantie,

Jugé: 1° Que l'acte de vente municipale doit être non seulement enregistré, mais que l'acquéreur doit aussi prendre possession de l'immeuble.

2° Que l'acquéreur d'un propriétaire primitif qui aura pris possession de l'immeuble et qui aura fait enregistrer son acte d'acquisition ne pourra pas être troublé dans la propriété, possession et jouissance d'icelui par un acquéreur, à une vente municipale, et qui n'aura pas fait enregistrer son titre de propriété et n'aura pas pris possession de l'immeuble.

Moses Hart acheta de John Perry, fils, le lot de terre n° 10, rang 4 de Warwick, le 29 avril 1808, par acte fait devant Gee et son confrère, notaires, et enregistré le 29 novembre 1830. Ruben-Moses Hart et Samuel-Judah Hart vendirent, en leur qualité d'héritiers, et comme étant aux droits des héritiers de Moses Hart, la moitié nord-est de ce lot de terre, à Houle, le 13 avril 1865, par acte fait devant A. DeFoy et son confrère, notaires, enregistré le 5 mai 1865. Houle vendit cette moitié à Pellerin, par acte fait devant d'Odet d'Orsonnens, notaire, et témoin, le 27 septembre 1866, et ce dernier l'occupe et la cultive actuellement. Caya a intenté une action au pétitoire, réclamant la propriété dudit demi lot de terre, contre Pellerin, et il alléguait: 1° Que ce lot de terre, n° 10, dans le 4me rang de Warwick, avait été vendu par vente municipale, pour taxes, le 5 février 1861, à Lambert, et que la corporation du comté d'Arthabaska lui en avait donné un acte de vente, le 27 avril 1863 ; 2° que Lambert en avait transporté la moitié indivise à Penn, par acte passé devant J. Belle et son confrère, notaires, le 31 juillet 1863 ; 3° que Cumming, exécuteur testamentaire de Penn décédé en avait fait la vente à Caya, par acte fait devant J. Belle, notaire, le 3 avril 1869. Caya concluait à être déclaré le propriétaire de la moitié du lot de terre que Pellerin occupait. Pellerin poursuivit son garant, Houle, et ce dernier poursuivit ses vendeurs, Ruben-M. Hart et Samuel-Judah Hart, en arrière garantie: Ruben-M. Hart, prit le fait et cause de Houle, dont il était garant, ainsi que

le fait et cause de Pellerin, pour la même raison, et il plaida à l'action principale: 1° Que son auteur, Moses Hart, avait pris possession dudit lot de terre, et qu'il avait enregistré son titre d'acquisition; 2° que Houle avait continué cette possession; qu'il lui avait vendu, et que l'acte de vente qu'il lui avait consenti était enregistré; 3° que Pellerin avait aussi continué la possession; que tous deux avaient fait des améliorations considérables sur la terre; et qu'ils ne pouvaient être dépossédés avant d'être, au préalable, remboursés de leurs améliorations, valant au-delà de $400; 4° que Lambert n'avait jamais eu la possession de l'immeuble, et qu'il n'avait jamais fait enregistrer l'acte de vente que lui avait fait la Corporation du comté d'Arthabaska; 5° que l'acte de vente qu'il avait fait, de la moitié indivise, à Penn, n'avait jamais été suivi de tradition, et que cet acte n'avait jamais été enregistré; 6° que l'acte de vente par Cumming, l'exécuteur testamentaire de Penn, de cet immeuble, à Caya, n'avait jamais été enregistré, ni suivi de tradition; 7° que, ni Lambert, Penn, Cumming, ni Caya n'avaient jamais eu l'appréhension dudit immeuble; 8° que l'appréhension et la possession dudit immeuble avaient été faites par Moses Hart, les héritiers de Moses Hart, Ruben-M. Hart et Samuel-J. Hart, et Houle et Pellerin; 9° que l'acte de vente de la corporation du comté d'Arthabaska et la corporation du canton de Warwick avait été fait illégalement, et sans avoir, au préalable, rempli tous les procédés requis pour faire cette vente, et que, par conséquent, l'action du demandeur principal devait être déboutée, avec tous les dépens qu'elle avait provoqués.

JUGEMENT: Attendu, que, par acte de vente passé devant DeFoy et son confrère, notaires, le treize avril 1865, Ruben-Moses Hart et Samuel-Judah Hart ont vendu la moitié nord-est du susdit lot de terre à Houle, lequel acte a été enregistré au bureau d'enregistrement du comté d'Arthabaska, le cinq de mai 1865; que, par sa seconde exception, Ruben-Moses Hart allègue que Caya, ni aucun de ses auteurs, n'ont jamais possédé ledit lot de terre, et n'en ont jamais eu la propriété, ni la jouissance; que par sa quatrième exception, Ruben-Moses Hart allègue que Lambert n'a jamais fait enregistrer, au bureau d'enregistrement du comté d'Arthabaska, où est situé ledit lot de terre, l'acte de vente que lui a consenti le secrétaire-trésorier de la corporation du comté d'Arthabaska, le vingt-six avril 1863, ni l'acte de vente qu'il a lui-même consenti à Penn, devant J. Belle et son confrère, notaires, le trente-et-un juillet 1863; que ni Lambert, ni Penn, ni les exécuteurs de ce dernier, ni Caya n'ont eu la possession de fait, de ce lot de terre. Considérant 1° que les allégations de la première exception de Ruben-Moses Hart sont prouvées: 2° que, par acte de vente,

passé devant DeFoy et son confrère, notaires, le treize avril 1865, Ruben-Moses Hart et Samuel-Judah Hart ont vendu, à Houle, cent acres du lot de terre sus-mentionné, du côté nord-est, et dont Caya réclame partie, icelui acte consenti par Ruben-Moses Hart, tant pour lui-même que comme procureur de Samuel-Judah Hart, et enregistré le cinq mai 1865, au bureau d'enregistrement du comté d'Arthabaska, dans les limites duquel comté ledit lot de terre est situé ; 3° que, par un autre acte de vente, passé devant d'Odet d'Orsonnens, notaire, et témoin, le vingt sept septembre 1866, Houle a vendu à Pellerin la susdite moitié nord-est du lot de terre plus haut mentionné et désigné, et dont Caya réclame partie ; 4° qu'il n'est pas prouvé que Lambert, Penn, les exécuteurs testamentaires de ce dernier, ni Caya, aient jamais été en possession de fait, de la moitié nord-est du susdit lot de terre, ni d'aucune partie d'icelui, tandis qu'il est établi que Houle l'a possédé et occupé pendant plusieurs années, à venir au temps qu'il l'a vendu à Pellerin, et que ce dernier l'occupe et possède depuis qu'il l'a acquis de Houle, c'est-à-dire depuis plus de trois ans ; 5° qu'il ne paraît pas au dossier que les actes sus-mentionnés et suivants aient été enregistrés, savoir celui de vente par le secrétaire-trésorier du comté d'Arthabaska à Lambert, le vingt-sept avril 1863, du lot de terre sus-désigné ; celui aussi de vente par Lambert à Penn, le trente-et-un juillet 1863, devant J. Belle et son confrère, notaires, et aussi celui de Cumming, en sa qualité d'exécuteur testamentaire et administrateur des biens de la succession de Penn, à Caya, devant J. Belle, notaire, le trois avril 1869, de la moitié du même lot de terre ; tandis qu'il est établi que l'acte de vente des cent acres de terre du côté nord-est dudit lot de terre, consenti par Ruben-Moses Hart et Samuel-Judah Hart à Houle, le treize avril 1865, a été enregistré le cinq mai de la même année ; 6° que Ruben-Moses Hart et Samuel-Judah Hart, et ledit secrétaire-trésorier du comté d'Arthabaska doivent être considérés comme le même vendeur, attendu que la vente faite par ce dernier était pour acquitter une dette des premiers, et qu'en réalité il vendait pour eux ; et qu'en suivant l'esprit de la lettre des sections 1, 5 et 6 de l'acte des Statuts Refondus pour le Bas-Canada, chapitre 37, reproduites par le Code Civil, articles 2088, 2089 et 2098, l'immeuble réclamé par Caya ne lui appartient pas, mais qu'il est la propriété de Pellerin ; qu'ainsi la demande principale est mal fondée. Déboute Caya de son action, et le condamne à tous les dépens, tant envers Pellerin, qu'envers Houle et Ruben-Moses Hart, sur toutes les demandes et défenses, et tant en demandant qu'en défendant. (2 *R. L.*, p. 44)

FELTON et HONAN, procureurs du demandeur.

LAURIER et RICHARD, procureurs du défendeur et demandeur en garantie.

L.-P.-E. CRÉPEAU, procureur du défendeur en garantie et demandeur en arrière garantie.

E.-L. PACAUD, procureur de R.-M. Hart, défendeur en arrière garantie.

MANDAMUS.

COUR SUPÉRIEURE, Trois-Rivières, 30 avril 1870.

Coram POLETTE, J.

GEORGES-A. GOUIN *vs* ALPHONSE DUBORD.

Jugé: 1° Qu'un officier, qui n'agit que pour exécuter les ordres de son supérieur, ne peut être poursuivi et contraint par *Mandamus* à accomplir un acte sur lequel il n'a aucun contrôle et dont l'exécution est entièrement à la discrétion de son supérieur.

2° Que, dans l'espèce, le défendeur, comme agent du Commissaire des Terres de la Couronne, n'avait de juridiction pour accorder les permis de coupe de bois, réclamés par cette action, qu'autant qu'il y aurait été autorisé par le commissaire.

3° Que lorsqu'un officier a un pouvoir discrétionnaire, il peut être contraint par *Mandamus* à exercer ce pouvoir discrétionnaire, mais ne peut pas être contraint à faire un acte quelconque qu'il a discrétion de faire ou de ne pas faire.

PER CURIAM : Le demandeur fait émaner un bref de *mandamus* contre le défendeur, en qualité d'agent des bois de la couronne pour le territoire du Saint-Maurice, pour l'obliger à lui accorder neuf limites de bois, ou plutôt neuf permis de coupe de bois, sur autant de limites, dans l'étendue de l'agence du défendeur, pour lesquelles limites il avait fait application le 11 juillet 1867, par lui-même et par d'autres personnes qui lui avaient ensuite transporté leurs droits, et se trouvaient vacantes. Il allègue, par sa requête libellée, qu'il avait payé les droits et rentes établis. Il allègue, en outre, que le commissaire des terres de la couronne a télégraphié au défendeur, le 19 janvier 1868, offrant au demandeur cinq limites sur neuf : que ce télégramme lui fut remis de suite, et que, pour mettre fin aux difficultés qu'il éprouvait, il accepta l'offre, mais qu'on refuse maintenant de lui accorder des permis pour les neuf limites, et même pour les cinq dont on lui a laissé le choix, bien qu'on ait toujours gardé tout le prix des neuf ; qu'aux termes de l'acte des Statuts Refondus du Canada, ch. 23, et des règlements faits d'après cet acte, le 12 juin 1866, il a droit aux neuf limites, et que le défendeur est tenu par la loi de

lui en accorder des permis. Conclusions : que le défendeur accorde, de suite, les neuf permis au demandeur, ou montre cause pourquoi la requête ne serait pas accordée, à défaut de quoi, il émane un bref de *mandamus* péremptoire ordonnant au défendeur d'accorder les neuf permis de coupe de bois, sinon qu'il y soit contraint par corps. Le défendeur rencontre cette demande par deux plaidoyers dont l'un en droit et l'autre au fond. Il plaide par le premier : que l octroi du bref de *mandamus* serait inutile, en autant qu'il n'a aucune autorité comme agent des bois de la couronne, excepté lorsqu'il est autorisé à agir en telle qualité par le commissaire des terres de la couronne, et qu'afin de produire son effet, ce bref devrait être adressé au commissaire ; par le second : qu'il est l'agent des bois de la couronne dans le territoire du Saint-Maurice, mais qu'il n'agit comme tel que lorsqu'il y est autorisé par le commissaire ; que, dans la présente affaire, le commissaire ne l'a pas autorisé à accorder des permis de coupe de bois au demandeur, et lui a même donné instruction de n'en pas accorder. La cour se dispensera de passer en revue tous les détails de la cause ; il lui suffira d'examiner deux questions dont une seule suffit, à mon sens, pour en disposer. 1 Le défendeur a-t-il, par la loi, le pouvoir d'accorder les permis de coupe de bois qu'on lui demande ? Il est nommé en vertu de l'acte des Statuts Refondus du Canada, ch. 23, déjà cité, et c'est la première section qui donne le pouvoir d'accorder ces permis : elle est comme il suit : " Le commissaire des terres de la couronne, ou " tout officier ou *agent sous ses ordres et dûment autorisé à* " *cet effet*, pourra accorder des permis de coupe de bois sur les " terres non concédées de la province, aux taux et conditions, " et d'après les règlements et restrictions qui pourront être " établis de temps à autre par le gouverneur en conseil, et " dont avis sera dûment donné dans la *Gazette du Canada*." Le commissaire a donc tout pouvoir d'accorder des permis de coupe de bois, aux taux et conditions et suivant les règlements qui peuvent être établis par le gouverneur en conseil. L'officier ou agent dont parle la section, est sur un pied tout différent ; il est sous les ordres du commissaire, c'est-à-dire, tous les devoirs qu'il remplit, il les tire, non de la loi, mois du commissaire qui lui donne ses ordres. Lorsqu'il s'agit de permis de coupe de bois, l'acte trace mot à mot la conduite de cet officier ou agent : " Le commissaire des terres de la cou- " ronne, y est-il dit, ou tout officier ou agent sous ses ordres " et *dûment autorisé à cet effet*, pourra accorder des permis de " coupe de bois." Ce n'est donc pas la loi qui lui donne le pouvoir d'accorder de tels permis, mais le commissaire qui peut, après l'avoir donné, le retirer à volonté, tant qu'il n'a pas été exercé. Et si le défendeur n'a pas le pouvoir, par lui-même,

d'accorder des permis de coupe de bois, qu'il lui faille pour agir, l'autorisation du commissaire, comment peut-on demander qu'il soit contraint à le faire; le bref ne servirait à rien, puisqu'il ne pourrait pas être exécuté. " The object of the " granting of the writ of *mandamus* being, as before stated, " to prevent a failure of justice, and to provide an imme- " diate and efficacious remedy, it follows that it will not be " granted if, when granted, it would be nugatory, in accor- " dance with the maxim, *lex non cogit ad inutilia.* So the " court will refuse it, if it be manifest that it must be vain " and fruitless, or useless, or cannot have a beneficial effect: " thus where the writ is sought *to one* magistrate to command " him to do that which cannot be done but by two" (Tapping, on *Mandamus*, p, 15.) " The writ of *mandamus* to restore, " &c., should be directed to him or them who has or have the " power of appointment, as to the incumbent, and not to the " churchwardens," (page 212). "It has therefore been held that " the writ will lie te compel a clerk of the court to deliver the " transcript on a writ of error, or appeal, if he illegally " refuses to do so. But it will in no case be allowed against " the clerk, unless it is clearly the *legal duty of such* " *officer to perform the act*, and the party asking it, has a " clear right to its performance, and has no other adequate " and specific remedy" (Moses, on *Mandamus*, p. 61, ch. 5). Tapping, p. 313: " The writ must be directed to all those who " are legally bound to execute it, and to them only, although " they may not be those whose wrongful act, &c., has occa- " sioned the writ. A breach of this rule renders the writ " liable to be either superseded or quashed." Si même le commissaire et l'officier ou agent avaient un pouvoir ou une juridiction concurrente, le bref devrait être adressé aux deux. " Where the act, the performance of which is commanded by the writ, is *joint* and one party only refuses, and the other or others are willing; nevertheless the writ must be directed against both or all. So where two only have a concurrent jurisdiction, the writ should, it seems, be directed to both, commanding them, or one of them, &c." (Tapping, page 314). Il est donc évident que le bref de *mandamus* ne doit pas, ne peut pas être adressé à quelqu'un qui n'a pas le pouvoir de l'exécuter, et comme le défendeur n'est pas revêtu du pouvoir de faire ce que le demandeur exige, la poursuite ne pouvait pas être dirigée contre lui. 2 La loi commande-t-elle impérativement d'accorder des permis de coupe de bois à ceux qui en demandent et qui payent les droits et rentes établis, comme le prétend le demandeur; ou donne-t-elle un pouvoir discrétionnaire d'en accorder ou non, suivant qu'il est jugé à propos? C'est dans la sect. 1ère, ci-haut rapportée de l'acte déjà

cité, que se trouve le pouvoir d'en octroyer. Il peut être utile de répéter la citation. " Le commissaire des terres de la cou-" ronne, ou tout officier ou agent sous ses ordres et dûment " autorisé à cet effet, *pourra* accorder des permis de coupe de " bois sur les terres non concédées de la province." La section ne dit pas que le commissaire, etc.. *accordera*, mais qu'il *pourra* accorder; elle est donc conçue en termes *facultatifs* et non *impératifs*. Si l'on dit que par le droit anglais, l'expression *pourra* est impérative en certains cas, l'on répondra que nos lois ont établi une règle qui nous donne la signification du *mot*, sans faire aucune des exceptions que le droit anglais nous présente. Nous avons d'abord l'acte d'interprétation, Statuts Refondus du Bas-Canada, ch. 1, section 13, § 3, qui nous dit: " Chaque fois que, par un acte quelconque, il est " prescrit qu'une chose sera faite, l'obligation de l'accomplir " sera sous-entendue; mais lorsqu'il est dit qu'une chose *pour-" ra* être faite, le pouvoir de l'accomplir sera facultatif." En anglais : " The word *shall* is to be constructed as imperative, and the word *may* as permissive." Cette règle se trouve dans notre Code Civil, article 15, comme il suit : " La disposition qui prescrit qu'une chose *se fera* ou *sera faite* est *obligatoire*. Celle qui énonce qu'une chose *peut* se faire ou être faite, est *facultative* seulement." Le commissaire des terres de la couronne est à la tête d'un département très important du gouvernement de la province, et, parce qu'il occupe cette place, il est membre du Conseil Exécutif et ministre, prenant conséquemment une part active dans l'administration des affaires publiques. L'on comprend, dès lors, qu'il doit avoir beaucoup de latitude, une grande liberté d'action pour conduire convenablement, et avantageusement pour le public en général, les affaires qui sont de son domaine, et ne pas être contrôlé surtout par des particuliers personnellement intéressés. Ne serait-il pas étrange que la loi autorisât le premier venu à venir lui dire : " Vous avez douze limites de bois actuellement " vacantes; je ne peux vous en demander qu'une, mais j'ai " onze amis ici qui vous demandent les onze autres et qui vont " me les céder ensuite; voici le prix des douze; donnez-moi " des permis pour toutes: " Si le commissaire était obligé d'obtempérer à une telle demande, il pourrait en résulter de grands inconvénients, de graves injustices. Supposons le cas d'un commerçant qui établirait à grands frais, des scieries, au vu et su du gouvernement et avec son assentiment, sur une rivière vers le haut de laquelle il y a beaucoup de bois de sciage sur pied, comme la chose a déjà eu lieu, et qui, sur sa demande au commissaire de lui accorder des permis de coupe de bois, en recevrait pour réponse, que la chose est devenue impossible, parce qu'on a été forcé de les accorder à quel-

qu'un, qu'on ne connaissait pas, mais qui est venu dire qu'il voulait les avoir et qui en a payé le prix et qu'il n'y a plus de limites vacantes, n'y aurait-il pas là une grave injustice ? Cependant le cas supposé n'est pas extrême et serait déjà arrivé, si le commissaire n'avait pas usé de discrétion dans l'exercice du pouvoir qu'il a d'octroyer des permis de coupe de bois. Ceci doit suffire pour convaincre de la nécessité qu'il y a de donner un pouvoir discrétionnaire. Aussi, lorsque le pouvoir de faire un acte quelconque est discrétionnaire, le *mandamus* ne peut pas être accordé, excepté seulement pour contraindre l'officier à exercer ce pouvoir discrétionnaire, lorsqu'il néglige de le faire ; mais le laissant libre de décider suivant son opinion, sans pouvoir aucunement le contrôler ni même l'influencer. " The duty must also be imperative, and " *not discretionary* ; there being numerous cases which " clearly established that a *mandamus* cannot issue to enforce " the exercise of a discretionary power, except in those cases " where such discretion is limited as to time, and such time as " passed ' (Tapping, pp. 12, 13). "As it lies not to command the " exercise of a discretionary or voluntary act, power, or right, " of what kind soever ; so neither does it lie to influence nor " control the exercise of such a discretionary act, power, or " right. Thus, the court will not grant the writ where a " matter is left to the discretion of an individual, or body of " men, which discretion has been exercised, and no ground " appears that, it has been done wrongfully. So the court " will not interfere with the discretion of an inferior jurisdic- " tion, where it is exercised in accordance with reasonable " rules or practice, which principle has been since confirmed by " many cases (pp. 13, 14). " The court will not grant a *man-* " *damus* where discretion is given to the commissioners, and " they had exercised it, no ground being shown that they had " done it wrongfully " (Impey, p. 108). " Where a discretion is " vested in any inferior court, and such court has exercised " it, a superior court cannot control such discretion by writ " of *mandamus*. The writ when directed to an inferior tri- " bunal, is a writ which seeks to compel action ; it does not, " however, point out to that court how it shall act in a mat- " ter over which it has a discretionary power" (Moses, pp. 53, 54). Pour ces motifs, la requête doit être renvoyée. Le jugement déclare la réponse du défendeur bonne et suffisante en loi et renvoie la déclaration ou requête libellée et l'action du demandeur avec dépens. (2 *R. L.*, p. 49, et 1 *R. C.*, p. 248)

A.-M. HART, avocat du défendeur.

W. HOULISTON, conseil.

ALLEYN et CHAUVEAU, avocats du défendeur.

A.-B. CRESSÉ, conseil.

CAUTIONNEMENT POUR FRAIS.—CURATEUR A L'ABSENT.

COUR SUPÉRIEURE, Sorel, 28 novembre 1867.

Coram LORANGER, J.

FRANÇOIS PARENT, ès-qualité, *vs* JOSEPH SAINT-JACQUES.

Jugé : 1° Qu'un curateur à l'absent, qui intente une action en sa qualité de curateur, n'est pas tenu de fournir le cautionnement *Judicatum solvi.*

2° Qu'un curateur à l'absent ne peut intenter une action pétitoire, dont l'issue peut entraîner la perte des droits de l'absent sur l'immeuble revendiqué, et qu'il ne peut intenter que les actions qui se rapportent à l'administration des biens.

Le demandeur alléguait, dans sa déclaration, que, par acte passé devant Duplessis et son collègue, notaires, à Sorel, le 1er septembre 1847, J.-B. Labarre vendit à Michel Lefort un emplacement y désigné; que Lefort prit incontinent possession dudit morceau de terre, et en devint le légitime propriétaire; qu'ensuite, vers le 23 février 1863, le défendeur, sans aucun droit ou titre quelconque, et connaissant bien que Lefort était le vrai propriétaire dudit terrain, en prit possession, et en jouit depuis contre la volonté du demandeur *ès-qualité,* et en perçoit les rentes et profits depuis le 23 février 1863; que le demandeur ès - qualité a été dûment nommé curateur audit Lefort, absent de cette province depuis plusieurs années, par acte dûment homologué à Sorel, le 22 mai 1865, lequel acte fut ensuite enregistré ; conclusion : que le demandeur, *ès-qualité,* soit déclaré le vrai et légitime propriétaire dudit morceau de terre, et que le défendeur soit condamné à le délaisser et à lui en livrer la possession, et à lui payer la valeur des loyers, rentes et profits qu'il en a retirés depuis le 23 février 1863, avec dépens. Le 13 novembre 1866, le défendeur fit motion à ce qu'en autant qu'il apparaissait, par le bref de sommation émané en cette cause, et la déclaration y annexée, que Lefort (auquel le demandeur a été nommé curateur en son absence du pays) est absent de cette province, et, nommément de cette partie de la province du Canada, ci-devant constituant le Bas-Canada, et est non résidant dans le Bas-Canada, et en autant que le demandeur s'est porté demandeur comme curateur audit absent, il, le demandeur, soit tenu de fournir au défendeur caution pour la sûreté des frais qui pourront être encourus en cette cause,et à ce que toutes les procédures soient suspendues jusqu'à ce que tel cautionnement soit fourni suivant la loi. La cour, par son jugement du 31 décembre 1866, rejeta cette mo-

tion. Le défendeur plaida ensuite par une défense en droit, et demanda le débouté de l'action : 1° Parce que le demandeur, *ès-qualité* de curateur à Michel Lefort, absent, n'expose aucun droit d'action ; 2° Parce que le demandeur, *ès* dite *qualité*, est mal fondé en droit à porter la présente demande au pétitoire, et que les pouvoirs d'un curateur à l'absent se bornent aux actes de pure administration, et, conséquemment, le demandeur n'a aucun pouvoir de poursuivre la présente action pétitoire, qui ne compète pas au demandeur *ès-qualité*. Conclusion au débouté de l'action et à ce que le demandeur soit condamné personnellement aux dépens.

JUGEMENT : " La cour, considérant que, suivant l'article 91 du Code Civil, les pouvoirs de curateur à l'absent se bornent aux actes de pure administration, et qu'il ne peut aliéner, engager, ni hypothéquer les biens de l'absent, et que, partant, il ne peut intenter que les actions qui se rapportent à cette administration ; considérant que ce pouvoir d'administration donné au curateur à l'absent est, en droit, le même que le pouvoir de gestion donné à un mandataire, par une procuration générale, et que tel curateur à l'absent ne peut pas, plus que le mandataire général, intenter les actions réelles dont l'issue peut entraîner la perte d'un immeuble, dont ni l'un ni l'autre n'ont le droit de disposer ; considérant, enfin, que le demandeur, en sa qualité de curateur à l'absent, ne pouvait intenter, contre le défendeur, une action pétitoire, dont l'issue pouvait entraîner la perte des droits de l'absent, sur l'immeuble revendiqué, au cas, entre autres, où le défendeur plaidant un titre de propriété adverse à celui de l'absent, triompherait dans sa défense, et obtiendrait un jugement en sa faveur, ce qui constituerait une aliénation virtuelle de l'immeuble. Que, si, au contraire, tel jugement n'emportait pas l'autorité de chose jugée contre l'absent, il s'ensuivrait que le défendeur, assigné par le demandeur, n'a pas été mis en présence de son légitime contradicteur, et qu'ainsi, suivant l'une ou l'autre de ces hypothèses, le demandeur était sans capacité légale à intenter la présente demande ; a maintenu et maintient la défense en droit du défendeur, et lui donne congé de l'action, avec dépens. (2 *R. L.*, p. 91)

OLIVIER et ARMSTRONG, avocats du demandeur.

LAFRENAYE et BRUNEAU, avocats du défendeur.

JURES DANS LES CAUSES CIVILES.

COUR DE CIRCUIT POUR LE DISTRICT DE RICHELIEU,
Sorel, 8 janvier 1870.

Coram LORANGER, J.

NARCISSE SYLVESTRE *vs* LOUIS MANSEAU.

Jugé : Qu'un juré spécial assigné pour servir dans une cause civile (action en dommages) et qui est déchargé avant de servir, n'a droit à aucun rémunération comme tel, la loi n'ayant pourvu qu'au paiement des douze jurés qui servent au procès.

Le demandeur alléguait qu'une action en dommages, pour injures verbales, a été intentée devant la Cour Supérieure du Bas-Canada, dans le district de Richelieu, le deux juillet 1869, pour la somme de $1,000, à la poursuite de Joseph Duguay contre Louis Manseau (le défendeur en cette cause) ; que le 9 octobre alors suivant (1869) une motion a été faite de la part de Louis Manseau, demandant un juré spécial, pour décider du litige lié entre lui et Duguay, et pour l'émanation d'un bref de *Venire Facias*, lequel a été émané le 15 décembre 1869, et un rôle de 24 jurés, tel que requis par la loi, a été préparé à cet effet le même jour par le protonotaire du district de Richelieu ; qu'en vertu du bref de *Venire Facias*, le shérif du district de Richelieu a, le 18 décembre 1869, sommé le demandeur d'être et de comparaître devant les Juges de la Cour Supérieure pour le Bas-Canada, en la chambre d'audience, en la ville de Sorel, lundi le vingt-septième jour de décembre alors courant, à dix heures de l'avant midi, pour, là et alors, servir comme juré spécial, dans l'action sus-mentionnée ; que le demandeur s'est rendu, tel qu'il en avait été requis, lundi le vingt-sept décembre 1869, à dix heures du matin, pour servir commé juré spécial dans ladite cause, et qu'après l'appel des jurés, il a été déchargé ; que les dépenses et la perte de temps occasionnées au demandeur par le voyage qu'il a été obligé de faire à Sorel pour servir comme juré sont de $2.50, dont $1.00 pour sa journée, et $1.50 pour son charretier. Conclusions au paiement de cette somme, avec dépens. A cette action le défendeur plaida : qu'il est vrai que le défendeur a demandé un procès par jurés dans une cause de Duguay contre lui, mais qu'il n'a fait qu'user du droit que lui donnait la loi, et qu'il s'est conformé en tout aux conditions imposées par le Code de Procédure Civile, dans le cas d'un procès par jurés ; qu'il a payé entre les mains du protonotaire la somme exigée par la loi pour le paiement des jurés, et que, si le demandeur n'a pas été payé et a quelques réclamations à faire,

il est non recevable en s'attaquant au défendeur qui a payé ce qu'il devait payer entre les mains de celui que la loi lui indiquait ; que l'action du demandeur est mal dirigée contre le défendeur. Le demandeur appuyait sa demande sur le Droit Commun, et prétendait qu'il n'était tenu à aucun service sans rémunération. Le défendeur, de son côté, soutient que la loi n'ayant pourvu qu'au paiement des douze jurés qui servent au procès, elle en avait par indifférence exclu les autres, et il cita l'article 416 du Code de Procédure Civile, et les 65e, 66e, 67e et 68e règles de pratique de la Cour Supérieure. La cour a débouté et déboute le demandeur de son action, avec dépens. (2 *R. L.*, p. 93)

A. GAGNON, avocat du demandeur.

BARTHE et BRASSARD, avocats du défendeur.

CURATEUR A L'ABSENT.—DEPENS.

COUR DE CIRCUIT, Sorel, 30 mai 1868.

Coram LORANGER, J.

JOSEPH SAINT-JACQUES *vs* FRANÇOIS PARENT.

Jugé : Qu'un curateur à l'absent qui intente, *ès-qualité*, une action pétitoire qui est déboutée parce qu'il n'a pas en loi le droit d'intenter une telle demande qui est une action réelle, peut être condamné personnellement aux dépens de cette action.

Le demandeur alléguait, dans sa déclaration : Que, par jugement rendu le 28 nov. 1867, par la Cour Supérieure siégeant en la ville de Sorel, le défendeur, en sa qualité de curateur ci-après expliquée, fut débouté de sa demande, avec dépens ; que le défendeur avait dirigé telle demande qui était une action pétitoire en s'intitulant et se déclarant " curateur dûment " nommé à Michel Lefort, ci-devant navigateur, de la paroisse " de Saint-Pierre de Sorel, un absent de cette partie de la pro- " vince, ci-devant constituant le Bas-Canada ;" que le défendeur s'était, en effet, fait nommer curateur audit Lefort, absent ; que le défendeur, en sadite qualité de curateur, avait poursuivi le demandeur, pour la revendication d'un immeuble qu'il alléguait appartenir audit absent ; que le défendeur a été débouté de sa demande au pétitoire, pour les raisons et motifs déduits et énoncés au jugement, savoir en autant que le défendeur, en sadite qualité de curateur, n'avait pas, en loi, le droit d'intenter une telle demande qui était une action réelle dont l'issue pouvait entraîner la perte de l'immeuble revendiqué par le défendeur, et tel que le tout appert au jugement

dont copie est produite, et aux autres pièces produites ; que, partant, le défendeur a causé, par telle demande, des dommages-intérêts, des frais et des dépenses au demandeur ; que les frais taxés, sur le renvoi de telle action, s'élèvent à la somme de $62.78 ; que le défendeur est tenu de réparer le tort qu'il a causé au demandeur, et est tenu de lui payer personnellement ladite somme de $62.78 ; que le défendeur qui a ainsi poursuivi le demandeur, sans avoir aucune capacité légale à ce faire, est tenu en loi de payer personnellement les susdits frais au demandeur, qui l'a souvent requis de ce faire, ce que le défendeur a toujours négligé de faire. Conclusions, au paiement de la somme de $62.78, avec intérêts et les dépens. Le défendeur répondit qu'en instituant ladite action pétitoire il était de bonne foi ; que la défense au fond en droit, produite par Saint-Jacques à l'encontre de l'action du défendeur, n'a été maintenue qu'après avoir été prise en délibéré ; que la propriété que Parent, en sa qualité de curateur à Lefort, a essayé de revendiquer, appartient réellement à Lefort, comme Saint-Jacques le savait bien, et Saint-Jacques n'a consenti de défendre à ladite action, en son propre nom, que sur la garantie fournie par son vendeur Pierre-Rémi Chevalier, que lui, Saint-Jacques, n'aurait rien à payer pour les frais de cette action ; que les plaidoyers que Saint-Jacques a opposés à ladite action pétitoire, instituée par Parent, *ès-qualité*, n'étaient pas faits de bonne foi ; et, de plus, que Saint-Jacques ne pouvait pas, en bonne foi, plaider comme il l'a fait, à la demande de Parent, *ès-qualité*, vu que, dans son acte d'achat de ladite propriété ainsi revendiquée, il reconnut que Lefort en était le propriétaire. Et le défendeur dit, de plus, que le demandeur n'a pas droit d'action contre lui, pour les causes, matières et choses mentionnées dans la déclaration du demandeur, parce que l'action pétitoire du défendeur fut renvoyée sur une défense au fond en droit, comme il appert au jugement rendu sur icelle ; et que le défendeur, Parent, fut condamné, *ès-qualité*, à payer les frais de ladite action pétitoire, et que Saint-Jacques, ayant déjà obtenu un jugement contre le défendeur, pour les frais de ladite action pétitoire, ne peut pas en obtenir un second pour les mêmes frais. Et Parent dit, de plus, que, par ladite défense au fond en droit sur laquelle jugement fut rendu comme susdit, Saint-Jacques demandait que Parent fut condamné personnellement au paiement des frais de ladite action pétitoire, mais que cette demande dudit Joseph Saint-Jacques fut rejetée : qu'adjudication étant déjà intervenue sur la demande que Saint-Jacques renouvelle par sa présente action, Saint-Jacques ayant accepté ledit jugement, il n'a pas droit d'action contre Parent pour le paiement des mêmes frais ; qu'il y a chose jugée entre les parties sur la

cause de la présente action du demandeur. La cour condamna le défendeur à payer au demandeur pour les causes mentionnées en sa déclaration, la somme de $62.78, avec intérêt du 11 mars dernier, et les dépens. (2 *R. L.*, p. 95)

LAFRENAYE et BRUNEAU, avocats du demandeur.

OLIVIER et ARMSTRONG, avocats du défendeur.

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A

ABSENT :—*Vide* CAUTIONNEMENT POUR FRAIS.

ACQUIESCEMENT. Il n'y a pas d'acquiescement à un jugement rendu, de la part d'une partie, de manière à la priver de son recours en revision de ce jugement, si elle a accepté le montant du jugement par erreur. (*Jones* vs *Warmington*, C. S. R., Montréal, 30 décembre 1869, MONDELET, J., BERTHELOT, J., et MACKAY, J., 14 J., p. 161, 2 R. L., p. 188, et 20 R. J. R. Q., p. 88)

" :—*Vide* JURIDICTION.

ACTE D'ACCUSATION. Lorsqu'un acte d'accusation pour parjure accuse le défendeur de s'être parjuré devant le "juge des Sessions générales de la paix dans et pour le district de Montréal," au lieu du "juge des sessions de la paix dans et pour la cité de Montréal," comme c'était le cas, la cour peut permettre de corriger cette erreur par un amendement fait après la production du plaidoyer de non-coupable. (S. R. C. de 1859, ch. 99, sec. 78). (*Regina* vs *Pelletier et al.*, C. B. R. en appel, Montréal, 9 mars 1870, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., 1 R. L., p. 565; 3 R. L., p. 124; 15 J., p. 146, et 20 R. J. R. Q., p. 377)

" AUTHENTIQUE. Les clercs et serviteurs du notaire qui reçoit un acte authentique, consenti par des parties qui ne savent pas signer leur nom, peuvent servir de témoins à tel acte. La prohibition d'appeler comme témoin à un acte le clerc et les serviteurs du notaire instrumentaire, ne s'applique qu'au testament, conformément à l'article 844 C. C., et ne peut être étendue aux autres actes authentiques ordinaires en vertu de la dernière partie de l'article 1208 C. C. (*Crébassa* vs *Crépeau*, et *Robitaille*, T. S., C. S. R., Montréal, 28 février 1868, MONDELET, J., BERTHELOT, J., et MONK, J., confirmant le jugement de C. C., Sorel, 4 mai 1867, LORANGER, J., 1 R. L., p. 667, et 20 R. J. R. Q., p. 422)

" AUTHENTIQUE :—*Vide* PREUVE.

" COMMERCIAL :—*Vide* PRESCRIPTION.

" CONSERVATOIRE :—*Vide* VENTE.

" DE FAILLITE : — *Vide* VENTE D'IMMEUBLE PAR UN SYNDIC A BANQUEROUTE.

" DE FAILLITE DE 1864 : — *Vide* LIQUIDATION FORCÉE SOUS L'ACTE DE FAILLITE DE 1864.

" DE FAILLITE DE 1864 :—*Vide* OBLIGATION.

ACTE DE FAILLITE DE 1869. Par la sec. 14 du ch. 16 du S. C. de 1869, 32-33 Vic., intitulé "Acte concernant la faillite," il est décrété que, si un débiteur cesse de faire honneur à ses engagements généralement, à leur échéance, un de ses créanciers ou plus, dont les créances s'élèveront en tout à plus de cinq cents piastres, pourra lui faire une demande, le requérant de faire une cession de ses biens et effets au bénéfice de ces créanciers. Par la sec. 15, si le débiteur auquel est faite cette demande prétend qu'elle n'a pas été faite conformément audit acte,—ou que les créances de ce ou de ces créanciers ne s'élèvent pas à cinq cents piastres, — ou qu'elles ont été obtenues en tout ou en partie afin de permettre à ce ou à ces créanciers d'instituer des procédures en vertu dudit acte, — ou que la cessation de paiement par ce débiteur n'était que temporaire, et qu'elle n'a pas eu lieu frauduleusement ou avec intention frauduleuse, ou en conséquence de ce que l'actif de ce débiteur ne lui permettait pas de faire honneur à ses engagements, il pourra, après avis à ce ou ces créanciers, mais seulement dans les cinq jours qui suivent cette demande, présenter une requête au juge demandant qu'aucunes procédures ultérieures en vertu dudit acte ne soient prises sur cette demande. Par la sec. 17, "si la requête est rejetée ou si, lorsque cette requête est pendante, le débiteur continue son commerce, ou procède à la réalisation de son actif, ou si aucune requête n'est présentée dans le temps prescrit, et que le failli néglige durant le même temps de faire une cession de ses biens et effets au bénéfice de ses créanciers, ses biens deviendront sujets à la liquidation forcée." Il a été jugé, sous ces dispositions, qu'un débiteur qui a été requis de faire une cession de ses biens sous ce statut et qui n'a pas présenté de requête dans les cinq jours, comme susdit, ne peut après l'expiration de ces cinq jours faire une cession volontaire de ses biens, et empêcher la liquidation forcée, et qu'une requête par ce débiteur faite après ce délai pour demander la suspension des procédés en liquidation forcée, parce qu'il aurait ainsi fait une cession volontaire après les cinq ours, sera renvoyée. (*Thomas dit Tranchemontagne* et *Martin*, C. B. R. en appel, Montréal, 22 janvier 1872, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., confirmant le jugement de C. S. R., Montréal, 30 novembre 1870, BERTHELOT, J., TORRANCE, J., et BEAUDRY, J., qui infirmait le jugement de C. S., Aylmer, 18 juin 1870, LAFONTAINE, J., 17 J., p. 11, et 20 R. J. R. Q., pp. 447 et 449)

" MUNICIPAL:—*Vide* SURINTENDANT SPÉCIAL.

" DE TEMPERANCE DE 1864. La sec. 14 du ch. 18 des Statuts du Canada de 1864, 27-28 Vict., intitulé: "Acte pour amender les lois en force concernant la vente des liqueurs enivrantes et l'octroi des licences à cet effet, et pour reprimer autrement les abus résultant de ce commerce" décrète que toute poursuite pour recouvrer l'amende, imposée pour contravention à cet acte, peut être intentée devant deux juges de paix pour le district, et que, dans ce cas, la sommation doit être signée par les juges et que nul autre juge de paix ne siègera ni ne prendra part dans l'affaire qu'en cas d'absence de ces deux juges, ou de l'un d'eux, et dans ce dernier cas qu'avec l'assentiment du juge présent. *Jugé* que, lorsqu'une sommation aura été signée par deux juges de paix, et qu'ensuite l'affaire sera jugée par l'un des juges de paix et un autre qui n'a pas signé la sommation, ce jugement ou conviction sera nul, s'il ne constate pas que ce

troisième juge de paix qui siège dans l'affaire et rend le jugement, le faisait en l'absence du premier et avec l'assentiment du juge présent, et il peut, par bref de prohibition, être fait défense à ces juges de paix de procéder à l'exécution de ce jugement ; le jugement devant constater qu'il a été rendu par le juge que la loi a institué. La juridiction des tribunaux inférieurs doit apparaître dans la conviction même. (*Dubord* et *Boivin*, C. S., Saint-Hyacinthe, 22 novembre 1866, SICOTTE, J., 14 J., p. 203, et 20 R. J. R. Q., p. 126)

ACTION DE BANQUE :—*Vide* BANQUE DE MONTRÉAL.

" EN BORNAGE. Dans une action en bornage, lorsque les allégations des parties ont rapport à leur possession respective, et mettent en question leurs titres, et que le tribunal ne peut connaître correctement les limites de leurs héritages, conformément à leurs titres et à leur possession, sans un plan figuratif d'iceux, et qu'il n'a pas suffisamment devant lui les preuves nécessaires pour baser un jugement, il peut ordonner la nomination d'un arpenteur pour dresser un plan figuratif des lieux en contestation, indiquant particulièrement les prétentions respectives des parties d'après leurs titres et d'après leurs possessions allégnées. (*Moineau* vs *Corbeille*, C. S., Montréal, 31 mars 1870, TORRANCE, J., 14 J., p. 236, et 20 R. J. R. Q., p. 166)

" DANS UNE COMPAGNIE INCORPOREE :— *Vide* COMPAGNIE DE CHEMIN DE FER.

" EN DENONCIATION DE NOUVEL ŒUVRE :— *Vide* COMPÉTENCE.

" NÉGATOIRE. L'action négatoire est le recours accordé par la loi, pour se prémunir contre le jugement d'un inspecteur de fossés, qui, en ordonnant, sous les dispositions de la section 31 du ch. 26 des S. R. B. C. de 1861, intitulé : " Acte concernant les abus préjudiciables à l'Agriculture," l'ouverture d'un fossé de ligne, a commis une injustice soit à la forme, en ne procédant pas suivant la loi, soit au fond en ordonnant des travaux inutiles, dispendieux ou dommageables. (*Lemire* et *Courchêne*, C. B. R. en appel, Montréal, 9 juin 1868, DUVAL, J., CARON, J., DRUMMOND, J., et BADGLEY, J., infirmant le jugement de C. S., Sorel, 25 janvier 1868, LORANGER, J., 1 R. L., p. 158, et 20 R. J. R. Q., p. 329)

" NÉGATOIRE :—*Vide* COUPE DE BOIS.

" PENALE :—*Vide* ACTION *qui tam*.

" " " COMMISSAIRE D'ÉCOLE.

" " " PREUVE.

" PÉTITOIRE. L'acquéreur d'un immeuble qui n'en a jamais été en possession, ne peut intenter une action pétitoire contre le détenteur de cet immeuble. (*Dubrule* et *Lafontaine*, C. B. R. en appel, 9 juin 1868, opinion de DUVAL, J. en C., 1 R. L., p. 709, et 20 R. J. R. Q., p. 466)

" PÉTITOIRE. Le curateur à l'absent ne peut intenter une action pétitoire dont l'issue peut entraîner la perte des droits de l'absent sur l'immeuble revendiqué ; il ne peut intenter que les actions qui se rapportent à l'administration des biens. Art. 91 C. C. (*Parent*, ès-qualité, vs *Saint-Jacques*, C. S., Sorel, 28 novembre 1867, LORANGER, J., 2 R. L., p. 91, et 20 R. J. R. Q., p. 497)

" QUI TAM. Le § 8 de la sec. 63 du ch. 24 des S. R. B. C. de 1861, intitulé : " Acte concernant les Municipalités et les Chemins dans le Bas-Canada," était en ces termes : "Toute poursuite pour le recouvrement d'amendes, en vertu de cet acte, sera commencée dans les six mois du jour où l'amende

aura été encourue; à moins qu'il ne soit autrement ordonné par cet acte; et toutes amendes payées, soit avant soit après la poursuite, comme il est dit plus haut, appartiendront, la moitié à la municipalité à l'égard de laquelle, ou pour l'infraction d'un règlement de laquelle, la poursuite est intentée, et l'autre moitié au poursuivant, à moins que la poursuite n'ait été intentée par l'ordre d'un conseil municipal ou par l'un de ses officiers, auquel cas la totalité de l'amende appartiendra à cette municipalité." Le § 1 de la section 64 dudit statut déclare que "toute personne majeure a et aura le droit d'intenter toute poursuite autorisée par les dispositions de cet acte." Il a été jugé, sous ces dispositions, qu'une poursuite pénale intentée par un particulier, contre un inspecteur des chemins pour avoir refusé et négligé de faire mettre à exécution un procès-verbal de route, devait être intentée par le demandeur, tant en son nom qu'au nom de la corporation municipale, si cette poursuite n'était pas intentée par l'ordre du conseil et par l'un de ses officiers, et qu'il pouvait intenter cette action sans avoir obtenu l'autorisation de la corporation. (*Lami* vs *Rabouin*, C. S., Trois-Rivières, 15 avril 1870, POLETTE, J., 1 R. L., p. 687, et 20 R. J. R. Q., p. 433)

ADJUDICATAIRE :—*Vide* EXÉCUTION DES IMMEUBLES.

AFFAIRE COMMERCIALE :—*Vide* PRESCRIPTION.

AGENT :—*Vide* ASSURANCE CONTRE L'INCENDIE.

" DES BOIS DE LA COURONNE :—*Vide* MANDAMUS.

AMENDE :—*Vide* ELECTION MUNICIPALE.

AMENDEMENT :—*Vide* EXCEPTION A LA FORME.

APPEL. Les procédés qui ont rapport au *scellé*, ou à l'apposition et à la levée des scellés sont de ceux qui requièrent celérité et prompte expédition et, sous le système de judicature en force dans le Bas-Canada, il n'y a pas de provision légale permettant l'appel à la cour du banc de la reine en appel, d'ordres ou jugements donnés et rendus dans ces matières, soit par la cour supérieure, ou par un juge d'icelle, ou par un juge de la cour de circuit. (*Andrews et ux.* et *Davies*, C. B. R. en appel, 14 juillet 1866, LAFONTAINE, J. (dissident), AYLWIN, J., DUVAL, J., et CARON, J., 1 R. L., p. 210, et 20 R. J. R. Q., p. 344)

" :—*Vide* PROCÉDURE.

" AU CONSEIL DE COMTE :—*Vide* SURINTENDANT SPÉCIAL.

" " PRIVE. La cour du banc de la reine, siégeant en appel, n'a pas le pouvoir de déclarer un appel au conseil privé abandonné, et ce, quoique le dossier n'ait pas été transmis au conseil privé, si un certificat a été produit que la requête en appel à sa Majesté en son conseil a été déposée au bureau du conseil privé, et que la cause a été référée au comité judiciaire. (*Whyte* et *The Home Insurance Company*, C. B. R. en appel, Montréal, 22 mars 1875, DORION, J. en C., MONK, J., TASCHEREAU, J., RAMSAY, J., et SANBORN, J., 19 J., p. 196, et 20 R. J. R. Q., p. 248)

" A LA COUR DU BANC DE LA REINE. Dans une poursuite intentée à la cour de circuit pour recouvrer la somme de $200, il n'y a pas, sous les dispositions de l'article 1142 C. P. C. qui dit que "les jugements de la cour de circuit sont susceptibles d'appel à la cour du banc de la reine, lorsque la somme ou valeur de la chose demandée est de cent piastres ou plus", d'appel a la cour du banc de la reine d'un jugement de la cour de revision, infirmant un jugement de la cour de circuit, qui avait débouté la demande intentée pour le recouvrement d'une somme de $200, et

condamnant le défendeur à payer au demandeur une somme de dix piastres et les frais d'une action appelable de $120. (*Hyacinthe dit Bellerose* et *Hart*, C.B.R. en appel, Montréal, 8 juin 1869, DUVAL, J. en C., CARON, J., BADGLEY, J., et MONK, J., 14 J., p. 223; 1 R. L., p. 157; 1 R. C., p. 231, et 20 R. J. R. Q., p. 154)

APPEL DES JUGEMENTS RENDUS SOUS L'ACTE MUNICIPAL. Sous les dispositions de la sec. 67 du ch. 24 des S. R. B. C. de 1861, intitulé : " Acte concernant les municipalités et les chemins dans le Bas-Canada," qui décrète que " toute personne qui se croit lésée par un jugement rendu en vertu de cet acte (à moins que ce jugement n'ait été rendu en première instance par la cour de circuit ou par la cour supérieure) pourra en appeler à la cour de circuit dans et pour le comté, ou du district, où le jugement aura été rendu ", il y a appel des décisions d'un conseil de comté rendues sur un appel de la décision du conseil local en vertu de la section 66 dudit statut; le conseil de comté, dans ce cas, devant être considéré comme tribunal judiciaire. (*Lafond et al.* vs *Boisvert et al.*, C. C., St-François-du-Lac, 21 octobre 1861, BADGLEY, J., 1 R. L., p, 494, et 20 R. J. R. Q., p. 371)

ARTICULATION DE FAIT. Celui qui a répondu aux articulations de faits de la partie adverse et a ensuite procédé à l'enquête, ne peut, à l'audition au mérite, demander le rejet de ces articulations comme irrégulières. (*Gaudet* vs *Laliberté*, C. S., Arthabaska, 1er septembre 1869, POLETTE, J., 1 R. L., p. 747, et 20 R. J. R. Q., p. 481)

ASSIGNATION. L'art. 1066 C. P. C. n'a pas modifié les dispositions du § 2 de la sec. 170 du ch. 83 des S. R. B. C. de 1861, et le délai d'assignation doit être calculé d'après la distance du lieu de la signification au lieu des audiences du tribunal, et non du domicile du défendeur. Ainsi, dans le cas où un défendeur est assigné à une distance plus rapprochée des audiences du tribunal que ne l'est son domicile, le délai d'assignation pourra être moindre qu'il n'eût été si l'assignation eût été faite à son domicile. (*Currier* vs *Lafrance*, C. S. R., Montréal, 30 octobre 1869, MONDELET, J., dissident, BERTHELOT, J., et TORRANCE, J., confirmant le jugement de C. C., Aylmer, 13 J., p. 329; 19 R. J. R. Q., p. 435, et 20 R. J. R. Q., p. 44)

" Lorsque l'assignation est faite personnellement au défendeur, dans un endroit autre que celui de son domicile, le délai est déterminé par la distance entre le lieu de l'assignation personnelle et le lieu des séances du tribunal, et non suivant la distance du lieu de son domicile au lieu de ces séances; ainsi, dans le cas où un défendeur est assigné personnellement à une distance plus rapprochée du lieu de l'audience du tribunal que ne l'est son domicile, le délai d'assignation pourra être moindre qu'il n'eût été si l'assignation eût été faite à son domicile. Arts 57 et 71 C.P.C. (*Smith* et *Donovan*, C. B. R., Montréal, 16 septembre 1875, DORION, J. en C., MONK, J., TASCHEREAU, J., RAMSAY, J., et SANBORN, J., confirmant le jugement de C. S. R., Montréal, 30 avril 1870, BERTHELOT, J., MACKAY, J., et TORRANCE, J., qui confirmait ce jugement de C. S., Montréal, 23 février 1870, BEAUDRY, J., 14 J., pp. 138 et 222; 2 R. L., p. 185; 19 J., p. 336, et 20 R. J. R. Q., p. 44)

" DES TEMOINS. Les huissiers résidant en dehors du chef-lieu d'un district, ne peuvent, sur la signification de subpœnas, dans la paroisse où ils résident, charger la route depuis le le palais de justice jusqu'au lieu d'assignation, quand même

ils seraient venus eux-mêmes au chef-lieu chercher les subpœnas, mais ils ne doivent charger la route que de leur domicile seulement. Les subpœnas doivent être envoyés à l'huissier par la malle; et, si l'huissier vient les chercher au chef-lieu, cette route doit être payée par la partie qui l'emploie. Il n'en serait pas de même, en thèse générale, pour la signification d'une action ou autre pièce de procédure qui pourrait nécessiter la présence de l'huissier au chef-lieu pour que des instructions particulières lui soient données. (*Lozeau* vs *Côté*, C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 49, et 20 R. J. R. Q., p. 292)

ASSURANCE :—*Vide* PREUVE.

" CONTRE L'INCENDIE. L'agent qui fait un emprunt pour son principal, sur la garantie de marchandises appartenant au principal qu'il a en sa possession, et dont il remet un reçu d'entrepôt au prêteur, et qui s'oblige personnellement à payer à ce dernier toute balance qui pourrait lui être due après la réalisation du gage, par la vente des marchandises, a un intérêt suffisant pour faire assurer ces marchandises contre l'incendie (arts 2472 et 2475 C. C.). Cette assurance est valide à compter du paiement de la prime et avant l'émission de la police; et cet agent peut transporter cette assurance au prêteur avant l'émission de la police par un simple transport fait sur le reçu a lui donné pour la prime (art 2576 C. C.), et ce prêteur cessionnaire peut, en vertu de ce transport, après l'incendie des marchandises, recouvrer de l'assureur le montant de l'assurance. (*O'Connor* vs *The Imperial Insurance Co.*, C. S., Montréal, 4 mars 1869, TORRANCE, J., 14 J., p. 219, et 20 R. J. R. Q., p. 146)

" CONTRE L'INCENDIE. Le cessionnaire d'une police d'assurance contre l'incendie, est soumis aux conditions de la police comme l'assuré lui-même, et il est tenu de donner les avis et de fournir la preuve du sinistre comme l'assuré lui-même y est tenu; et si les avis et la preuve requise par la police ne sont pas fournis de la manière et dans le temps prescrits, ni par l'assuré ni par le cessionnaire, ce dernier ne pourra recouvrer le montant de l'assurance. (*Whyte* et *The Home Insurance Company*, C. B. R. en appel, Montréal, 20 septembre 1873, DUVAL, J. en C., DRUMMOND, J., BADGLEY, J., (*dissident*), MONK, J., (*dissident*), et TASCHEREAU, J., confirmant le jugement de C. S. R., Montréal, 30 janvier 1872, MONDELET, J., BERTHELOT, J., et MACKAY, J., qui infirmait le jugement de C. S., Montréal, 30 septembre 1870, TORRANCE, J., 14 J., p. 301; 2 R. C., p. 232, et 20 R. J. R. Q., p. 244)

" CONTRE L'INCENDIE. Lorsqu'une police d'assurance contre le feu contient une condition que dans le cas de transport de la police, le cédant devra fournir lui-même la preuve nécessaire de la réclamation, avant que cette réclamation soit reconnue et payable, et qu'un transport de cette police a lieu, le cessionnaire ne peut recouvrer le montant de l'assurance s'il a fourni lui-même cette preuve, au lieu de l'assuré cédant. Lorsqu'une condition de la police exige la preuve de la perte dans un certain délai, le délai forme une partie importante de la condition, et, à défaut de la renonciation, par l'assureur, à cette condition, l'assuré ne peut recouvrer s'il n'a pas fourni la preuve dans le délai prescrit. Le défaut par l'assureur de répondre à une lettre transmise par l'assuré après le délai pour fournir la preuve, et demandant si la preuve fournie est suffisante, ne peut-être considérée comme une renonciation à cette condition de la police. Si dans le délai fixé pour fournir la preuve, l'assureur répond

à l'assuré, qui lui demande si la preuve fournie est suffisante, qu'il ne doit pas l'assurance, cette réponse doit être considérée comme une renonciation à la condition de la police quant à la preuve, et comme indiquant que la compagnie entend refuser le paiement par quelque objection au mérite. (*Whyte* et *The Western Assurance Company*, Conseil Privé, 9 mars 1875, confirmant le jugement de C. B. R. en appel, Montréal, 20 septembre 1873, DUVAL, J. en C., DRUMMOND, J., BADGLEY, J., (*dissident*) MONK, J., (*dissident*) et TASCHEREAU, J., qui confirmait le jugement de C. S. R., Montréal, 30 avril 1872, BERTHELOT, J., MACKAY, J., et BEAUDRY, J., qui approuvait la charge aux jurés de TORRANCE, J., 22 J., p. 215; 7 R. L., p. 106, et 20 R. J. R. Q., p. 249)

ASSURANCE CONTRE L'INCENDIE. Placer dans les bâtisses assurées une machine à gasoline, d'une nature dangereuse, sans le consentement de l'assureur, est une violation de la police. (*Mathews* vs *The Northern Assurance Company*, C. S., Montréal, 31 mai 1871, MONDELET, J., 1 R. C., p. 475; 3 R. L., p. 450, et 20 R. J. R. Q., p. 44)

" CONTRE L'INCENDIE. Il est de l'essence du contrat d'assurance d'objets mobiliers que les choses assurées et leur position soient connues et comprises des deux parties. Le lieu où les effets sont situés est toujours un motif déterminant du contrat, et il n'est jamais indifférent pour l'assureur que ce lieu soit convenablement indiqué. Lorsque des effets sont assurés dans une bâtisse, on doit communiquer à l'assureur toutes les informations pouvant lui faire apprécier le risque; par exemple, de quels matériaux la bâtisse est faite, sa situation et sa distance des autres bâtisses. Mais si les deux parties se sont entendues sur la substance; si l'assureur sait ce dont il prend le risque, une simple inexactitude de description n'affecte pas le contrat. Lorsqu'un marchand et commerçant, qui occupe, comme magasin et manufacture, une bâtisse portant les n°s 317 et 319 d'une rue et le 3ème étage du n° 315, fait assurer son fonds de commerce, ses outils et machineries dans les n°s 317 et 319 de cette rue, sans faire mention du n° 315 dont il n'occupe que l'étage supérieur et auquel il communique par une porte qui a été pratiquée entre les deux bâtisses n'ayant pas de communication avec les étages inférieurs du n° 315, les effets qui se trouvent dans le n° 315, lequel forme partie de l'établissement de l'assuré, ne sont cependant pas compris dans l'assurance. L'irrégularité dans la désignation des numéros dans lesquels se trouvent les effets, en disant seulement les n°s 317-319, n'affecte pas le contrat quant à l'assureur des choses qui sont dans cette bâtisse, mais ce contrat ne couvre pas les choses qui sont au n° 315, lesquelles ne sont pas mentionnées dans la demande et la police. Il n'appartient pas au jury de décider si le contrat couvre les effets qui sont au 3ème étage du n° 315, et si, d'après les circonstances, ces effets font partie du contrat d'assurance, les jurés ne pouvant s'enquérir que de la partie des objets appartenant à l'assuré qui ont été réellement assurés, et qui ne comprenaient que ceux qui étaient aux n°s 317 et 319. Aucune question ne doit donc leur être faite relativement aux effets qui se trouvent au n° 315; et si, sous la direction du juge présidant au procès, on pose aux jurés une question concernant les dommages éprouvés par la perte des effets qui se trouvent au n° 315, il y aura lieu à un nouveau procès. (*Rolland* vs *Cie d'Assurance North British and Mercantile*, C. S., Mont-

réal, 17 décembre 1869, MACKAY, J., déclarant illégale la charge du juge MONDELET qui avait soumis à la décision du jury la question de savoir si les effets placés dans le n° 315 étaient couverts par l'assurance, 14 J., p. 69, et 20 R. J. R. Q., p. 11)

ASSURANCE MARITIME. Si un avis du délaissement d'un vaisseau assuré est donné par l'assuré à l'assureur, et si l'assureur ne dit rien et ne fait rien, on doit conclure que cet assureur n'a pas l'intention d'accepter le délaissement. Mais, si l'assureur, sans rien dire et sans refuser d'accepter le délaissement, par son agent qu'il autorise à voir à ses intérêts au sujet du vaisseau, en prend possession, sans informer l'assuré dans quel but il en prend ainsi possession, et le répare jusqu'à ce qu'il le fasse vendre, pour sauvetage qu'il réclame, par un procédé *in rem* de la Cour d'Amirauté auquel l'assuré n'est pas partie, il (l'assureur) est censé avoir tacitement accepté le délaissement (art. 2547 C. C.). L'acceptation tacite du délaissement produit le même effet, quant aux droits des parties, que l'acceptation expresse. Lorsque l'agent de l'assureur qui, après le sinistre, a pris possession du vaisseau et l'a réparé, a été autorisé à voir aux intérêts de l'assureur, ses actes en exécution de son autorisation, unis à la non-répudiation du délaissement étant suffisants pour établir une acceptation tacite, l'assureur se trouve lié par les actes de cet agent. Après l'acceptation même tacite par l'assureur du délaissement d'un vaisseau sombré que cet assureur relève et répare, il est responsable comme pour une perte totale, et il ne peut soutenir ensuite que la perte n'était pas une perte totale. Lorsqu'un vaisseau, actuellement à Terre-Neuve, est assuré à Montréal pour un temps déterminé, avec l'autorisation de faire la navigation entre Montréal, Terre-Neuve, la Nouvelle-Ecosse et les Indes Occidentales, avec prohibition d'entrer dans le golfe Saint-Laurent avant le 25e jour d'avril, ni d'être dans ledit golfe avrès le 15e jour de novembre, et défense de partir de Terre-Neuve après le 1er jour de décembre, ou avant le 15e jour de mars, si le vaisseau part de Montréal, le 16 novembre, pour se rendre à Saint-Jean de Terre-Neuve et périt dans le golfe Saint-Laurent, près de l'île d'Anticosti, au commencement de décembre, l'assureur n'est pas tenu de payer la perte, quoiqu'il soit établi que les vaisseaux partent souvent après le 15 novembre pour descendre le golfe, mais n'entrent jamais dans le golfe pour remonter le fleuve après le quinze de ce mois. Mais, si l'assureur, en connaissance des faits, accepte le délaissement du vaisseau ainsi assuré, et qui a péri dans un temps et dans un lieu prohibés par la police, il ne peut, après avoir fait cette acceptation, prétendre qu'il n'est pas obligé, parce que le vaisseau, lorsqu'il a péri n'était pas couvert par l'assurance; l'acceptation du délaissement ayant l'effet d'une renonciation à cette prohibition du contrat d'assurance. Le propriétaire conjoint de la moitié d'un vaisseau qui, avec l'autorisation de son co-propriétaire, assure tout le vaisseau en son propre nom, peut recouvrer de l'assuré tout le montant de l'assurance. Cette autorisation peut être prouvée par la déclaration d'un témoin que le co-propriétaire, décédé depuis, lui aurait dit qu'il avait autorisé cette assurance. (*The Provincial Insurance Company of Canada* et *Leduc*, Conseil Privé, 26 juin 1874, confirmant le jugement de C. B. R. en appel, Montréal, 22 mars 1872, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J. (*dissident*), et MONK, J. (*dissi-*

dent), qui confirmait le jugement de C. S., Montréal, 31 mars 1870, MACKAY, J., 14 J., p. 273 ; 19 J., p. 281 ; 5 R. L., p. 579 ; 6 L. R. P. C., p. 224, et 20 R. J. R. Q., p. 203)

ASSURANCE MARITIME ET CONTRE L'INCENDIE D'UN VAISSEAU ENREGISTRE. L'acquéreur d'un vaisseau naviguant à l'intérieur, qui a présenté son acte de vente au collecteur du port où le certificat de propriété du vaisseau a été accordé, pour le faire enregistrer conformément aux dispositions de la s. 16 du ch. 41 des Statuts Refondus du Canada de 1859, intitulé: " Acte concernant l'enregistrement des vaisseaux naviguant à l'intérieur ", a un intérêt suffisant dans le vaisseau pour le faire assurer contre le feu et contre les accidents de la navigation, quoique le collecteur du port n'ait pas de fait enregistré cet acte de vente, parce que le certificat de propriété du vaisseau ne lui aurait pas été produit en même temps que l'acte de vente, ce qu'il n'avait pas le droit d'exiger. Celui qui réclame le montant de l'assurance d'un vaisseau dont il soutient être propriétaire en vertu d'un titre qu'il produit, peut, si ce titre n'est pas considéré suffisant, s'appuyer sur un titre antérieur qui aurait l'effet de lui conférer un intérêt suffisant dans le vaisseau pour le faire assurer. L'un de deux fidéicommissaires (*trustees*) propriétaires d'un vaisseau a un intérêt suffisant dans le vaisseau pour le faire assurer en son propre nom. Il n'est pas nécessaire d'avoir la propriété absolue d'un vaisseau pour le faire assurer, il suffit d'un droit qualifié sur ce vaisseau. La possession d'un vaisseau avec le droit de l'administrer confère un intérêt suffisant pour le faire assurer. Art. 2472 C. C. (*Moore* vs *The Home Insurance Company*, C. S., Montréal, 30 décembre 1869, MACKAY, J., 14 J., p. 77, et 20 R. J. R. Q., p. 20)

AVOCAT :—*Vide* PROCÉDURE.

" :—*Vide* TRANSACTION.

B

BAIL :—*Vide* COMPÉTENCE.

" :—*Vide* LOUAGE.

BANQUE :—*Vide* CORPORATION ÉTRANGÈRE.

" DE MONTREAL. La déclaration mentionnée dans la sec. 17 du ch. 75 des statuts du Canada de 1856, 19 Vic., intitulé : " Acte pour amender et refondre les divers actes incorporant et concernant la Banque de Montréal," pour la transmission des droits dans le capital de ladite banque, peut être faite par le cessionnaire de ces droits aussi bien que par celui à qui ces droits sont échus, tel que mentionné dans ladite section. (*La Banque de Montréal* et *Henderson et al.*, C. B. R. en appel, Montréal, 4 mars 1870, DRUMMOND, J., BADGLEY, J., MONK, J., et POLETTE, J. *ad hoc*, 14 J., p. 169, et 20 R. J. R. Q., p. 98)

" DE MONTREAL. Nonobstant les dispositions de la sec. 16 du ch. 76 des statuts du Canada de 1856, 19 Vict., intitulé : " Acte pour amender et refondre les divers actes incorporant et concernant la Banque de Montréal," un actionnaire dans le capital de la Banque de Montréal peut transférer des actions par acte devant notaire ou de toute autre manière légale, mais le transfert dans les livres de la banque doit être fait conformément aux dispositions de cette section. (*La Banque de Montréal* et *Henderson et al.*, C. B. R. en appel, Montréal, 4 mars 1870, DRUMMOND, J., BADGLEY, J., MONK, J., et POLETTE, J. *ad hoc*, 14 J., p. 169, et 20 R. J. R. Q., p. 98)

BATARD :—*Vide* SUBSTITUTION.
" ADULTERIN :—*Vide* TESTAMENT.
BILLET PROMISSOIRE. Un billet signé par une femme mariée séparée de biens, est valide bien qu'elle l'ait signé sans l'autorisation de son mari, si ce billet a été donné en paiement d'épiceries et autres choses nécessaires à sa famille, qu'elle aurait achetées. (*Rivet et al.* vs *Léonard et vir*, C. S., Montréal, 17 octobre 1848, ROLLAND, J. en C., DAY, J, SMITH, J., 1 J., p. p. 172; 5 R. J. R. Q., p. 486, et 20 R. J. R. Q., p. 89)
" PROMISSOIRE. La femme mariée séparée de biens peut valablement signer un billet à l'ordre de son mari, sans qu'il y soit dit qu'elle ait reçu l'autorisation de son mari pour cela, si le billet est donné en paiement d'épiceries et autres choses nécessaires à la famille, qu'elle aurait achetées. (*Cholet* vs *Duplessis et vir*, C. S., Montréal, 28 février 1862, BADGLEY, J., 12 D. T. B. C., p. 303; 6 J., p. 81; 10 R. J. R. Q., p. 44, et 20 R. J. R. Q., p 89)
" PROMISSOIRE. Un billet signé par une femme mariée séparée de biens, sans l'autorisation de son mari, et donné en paiement de machandises vendues et livrées, est nul, quoique la femme ait elle-même fait l'achat desdites marchandises. (*Badeau* vs *Brault et ux.*, C. S, Montréal, 30 avril 1857, DAY, J., SMITH, J., et CHABOT, J., 1 J., p. 171; 5 R. J. R. Q., p. 485, et 20 R. J. R. Q., p. 89)
" PROMISSOIRE. Une femme mariée n'est pas responsable du prix d'effets non nécessaires à la vie qu'elle aurait achetés sans l'autorisation de son mari, et les billets qu'elle aurait donnés en paiement du prix de ces effets et qu'elle aurait signés sans y être autorisée sont nuls, arts. 177, 1301 et 1317 C. C. (*Danziger* et *Ritchie et ux.*, C. B. R. en appel, Montréal, 9 mars 1864, DUVAL, J., MEREDITH, J., MONDELET, J., et BADGLEY, J., confirmant le jugement de C. S,, Montréal, 20 mai 1863, MONK, J., 14 D. T. B. C., p. 425; 8 J., p. 103; 13 R. J. R. Q., p. 169, et 20 R. J. R. Q., p. 89)
" PROMISSOIRE. Un billet promissoire qui n'est pas à ordre ne peut être transporté par endossement en blanc par la personne en faveur de qui le billet a été consenti, et une poursuite, intentée sur ce billet par une personne autre que celle en faveur de qui il a été consenti, sera renvoyée, si ce billet ne porte que l'endossement en blanc de cette dernière personne. (*La Banque du Peuple* vs *Ethier*, C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 47, et 20 R. J. R. Q., p. 291)
" PROMISSOIRE :—*Vide* PAIEMENT.
" " :— " LETTRE DE GARANTIE.
" " :— " OBLIGATION.
BOIS COUPES SUR LES TERRES PUBLIQUES :—*Vide* BOIS SUR LES TERRES PUBLIQUES.
" SUR LES TERRES PUBLIQUES. Une saisie faite sous les dispositions de la sec. 8 du ch. 23 des statuts refondus du Canada de 1859, intitulé : "Acte concernant la vente et l'administration des bois sur les terres publiques," de bois coupés sans droit sur les terres publiques, doit être faite par écrit, et si elle n'est pas faite par écrit, elle n'a aucune valeur. Mais, malgré que la saisie soit nulle, celui qui a coupé ces bois sans avoir payé les droits, ne peut ni les revendiquer ni en réclamer la valeur, vu que, par la loi, il n'a acquis aucun droit sur ces bois. (*Rivard* vs *Belle*, C. S., Joliette, 21 juin 1866, LORANGER, J., 1 R. L., p. 571, et 20 R. J. R. Q., p. 380)
BORNAGE. Lorsqu'une clôture a existé pendant plus de trente ans, entre les héritages des parties à une action en bornage, et

que la possession de chacune d'elles a existé pendant le même temps jusqu'à cette clôture, le bornage doit se faire en suivant la ligne que suit cette clôture. (*Ricard* vs *La Fabrique de Ste-Jeanne-de Chantal*, C. B. R. en appel, Montréal, 9 juin 1868, DUVAL, J., AYLWIN, J., CARON, J., BADGLEY, J., et DRUMMOND, J., 1 R. L., p. 713, et 20 R. J. R. Q., p. 468)

BORNAGE :—*Vide* ACTION EN BORNAGE.

BOURSE DE QUEBEC :—*Vide* MAINMORTE.

BREF DE PROHIBITION :—*Vide* PROHIBITION.

C

CAPACITE DE CONTRACTER D'UNE PERSONNE ACCUSEE DE MEURTRE. Une femme accusée du meurtre de son mari, peut, dans l'époque intermédiaire de l'accusation et de la condamnation, contracter un engagement valable pour se faire défendre de l'accusation. L'avocat envers qui un tel engagement est contracté peut en réclamer le montant en justice, lorsqu'aucune preuve de surcharge ou de contrainte morale n'est faite. Lorsqu'après la conviction, les biens confisqués au profit de la couronne sont remis par cette dernière aux enfants de la femme condamnée, ces enfants sont obligés d'acquitter les obligations jusqu'à concurrence des biens qu'ils reçoivent de la couronne. (*Gauthier* vs *Joutras*, C. S., Sorel, 31 mars 1869, LORANGER, J., 1 R. L., p. 473; 2 La Thémis, p. 82, et 20 R. J. R. Q., p. 359)

CAPIAS. Celui qui a déposé un cautionnement au shérif en faveur d'un locataire arrêté en vertu d'un *capias ad respondendum*, pour avoir enlevé ses meubles des lieux loués et les avoir cachés dans l'intention de ne pas payer le loyer échu et de frauder le locateur, est une caution judiciaire passible de la contrainte par corps. (*Belle* vs *Côté*, C. C., Montréal, 31 décembre 1868, BEAUDRY, J. A., 13 J., p. 26; 19 R. J. R. Q., p. 73, et 20 R. J. R. Q., p. 239)

" Le créancier qui a obtenu jugement contre son débiteur et qui, en exécution de ce jugement, a fait saisir les immeubles de ce dernier, peut, cependant, avant de connaître le résultat de la saisie des immeubles, faire émaner contre lui un bref de *capias*, dans les cas prévus par la loi. L'emploi du bref de *capias* n'est pas une voie d'exécution d'un jugement; c'est seulement un moyen d'empêcher le débiteur de laisser la province, et se ménager, par là, une chance de se faire payer. Il n'est pas plus une voie d'exécution que ne l'est la saisie conservatoire, l'arrêt simple et la saisie-gagerie. Mais, en supposant que le bref de *capias* fut un moyen d'exécution, le créancier aura encore le droit de s'en servir, parce que la loi lui permet de cumuler les contraintes (Art. 554 C. P. C.). (*Gaudet* vs *Laliberté*, C. S., Arthabaska, 1er septembre 1869, POLETTE, J., 1 R. L., p. 747, et 20 R. J. R. Q., p. 481)

" Le créancier qui a fait émaner un bref de *capias* contre son débiteur, qui a été cassé sur requête, peut, avant d'avoir payé les frais sur le premier bref ainsi annulé, en faire émaner un second. Il peut payer les frais ensuite, et tout ce que le défendeur peut faire, si le demandeur ne paie pas les frais du premier bref, c'est d'obtenir un ordre de paiement sous un court délai, et faire casser ce bref si les frais sur le premier ne sont pas payés dans le délai prescrit. S. R. B. C. de 1861, ch. 82, sec. 25 et arts 450 et 453 C. P. C. (*Gaudet* vs *Laliberté*, C. S., Arthabaska, 1er septembre 1869, POLETTE, J., 1 R. L., p. 747, et 20 R. J. R. Q., p. 481)

CAPIAS. Le débiteur arrêté sur *capias* et emprisonné, qui fait une cession de ses biens, n'a pas le droit d'être libéré immédiatement après avoir fait cette cession, il doit attendre les quatre mois que les créanciers ont pour contester cette cession de biens. (Arts 773, 774 et 776 C. P. C. (*Winning et al.*, vs *Leblanc et al.*, et *Leblanc*, réq., C. S., Montréal, 30 decembre 1870, TORRANCE, J., 14 J., p. 335, et 20 R. J. R. Q., p. 240)

" La réclamation du propriétaire de marchandises, qui les a confiées à Marseilles, en France, à un voiturier par eau, qui a, là, signé un connaissement s'obligeant de les transporter à Montréal, dans cette province, pour la valeur de ces marchandises que le voiturier ne délivre pas à destination, à Montréal, n'est pas une dette créée hors de la province (art. 806 C. P. C.); et cette créance ne repose pas non plus sur une demande de dommages-intérêts non liquidés (art. 801 C. P. C.), et un bref de *capias* peut émaner dans la province basé sur cette créance. (*Koornhuyse* vs *Grondin*, C. S., Montréal, 31 mai 1870, TORRANCE, J., 14 J., p. 218, et 20 R. J. R. Q., p. 145)

" Le demandeur sur *capias* n'est pas tenu de faire signifier par un huissier la déclaration au défendeur lui-même ou au greffe, mais il peut en laisser au greffe une copie pour le défendeur, et faire constater tel dépôt sur l'original par le protonotaire. Art. 804 C. P. C. (*Gaudet* vs *Laliberté*, C. S., Arthabaska, 1er septembre 1869, POLETTE, J., 1 R. L., p. 747, et 20 R. J. R. Q., p. 481)

" Un jugement rendu dans la province, condamnant le maître d'un vaisseau transatlantique à payer à un passager qui avait fait la traversée de l'océan dans son vaisseau, de Glasgow à Montréal, la valeur du bagage de ce passager, lequel avait été volé à bord du vaisseau, ne constitue pas une dette ayant pris naissance en pays étranger dans le sens du ch. 87 des S. R. B. C. de 1861, sec. 7, § 2, intitulé: "Acte concernant l'arrestation et l'emprisonnement pour dettes ainsi que le soulagement des débiteurs insolvables." Un jugement avait été rendu par la Cour Supérieure contre le défendeur, maître de vaisseau, résidant à Glasgow, en Ecosse, le 29 février 1860. Le défendeur ne vint pas dans la province en 1860, mais il y arriva dans le mois de mai 1861 à bord du vaisseau "Toronto" dont il était le maître. Le demandeur fit décerner contre lui un bref de *capias*. La déposition alléguait, comme raison de la croyance du déposant, que depuis la date dudit jugement le défendeur n'avait fait aucun effort pour le payer; qu'il était marin résidant en dehors de la province du Canada, mais temporairement dans le district de Montréal, d'où il devait repartir sous peu de jours pour retourner dans la Grande-Bretagne, sans avoir fait de provision pour le paiement de la réclamation du demandeur. Le défendeur fit motion pour faire casser le bref de *capias*, alléguant que la cause de la dette avait pris naissance en pays étranger, et que les allégations de la déposition étaient insuffisantes, vagues et contradictoires. Cette motion fut rejetée, la cour jugeant la déposition suffisante. (*McDougall* vs *Torrance*, C. S., Montréal, 31 mai 1861, MONK, J., 5 J., p. 148; 8 R. J. R. Q., p. 137, et 20 R. J. R. Q., p. 145)

" :—*Vide* CONTRAINTE PAR CORPS.

" :— " DÉTENTEUR DE TERRE HYPOTHÉQUÉE.

" :— " PROCÉDURE.

CAPITAL:—*Vide* BANQUE DE MONTRÉAL.

CAUSES DES CONTRATS :—*Vide* OBLIGATION.
CAUTION JUDICIAIRE :—*Vide* CONTRAINTE PAR CORPS.
CAUTIONNEMENT. Une décharge d'un débiteur insolvable, obtenue sous l'acte de faillite de 1864, n'a pas l'effet de décharger la caution qui, par une lettre de garantie, s'est obligée de payer un certain montant d'avances faites au failli. Statut du Canada de 1864, ch. 17, sec. 9, § 4. (*Martin* vs *Gault et al.*, C. B. R. en appel, Montreal, 9 mars 1871, DUVAL, J. en C., CARON, J., DRUMMOND, J., dissident, BADGLEY, J., et MONK, J., confirmant le jugement de C. S., Montréal, 30 avril 1870, TORRANCE, J., 15 J., p. 237, et 20 R. J. R. Q., p. 452)
" :—*Vide* CAPIAS.
" :— " FEMME MARIÉE.
" :— " LETTRE DE GARANTIE.
" EN APPEL. Il n'est pas nécessaire d'annexer au cautionnement en appel les affidavits de justification des cautions. (*Gingras* et *Veer*, C. B. R. en appel, Québec. 20 septembre 1868, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., 1. R. C., p. 233, et 20 R. J. R. Q., p. 353)
" EN APPEL. Il n'est pas nécessaire que le cautionnement, dans les appels de la cour de circuit, mentionne une somme déterminée pour laquelle les cautions se sont rendues responsables. (*La Fabrique de Ste-Julie-de-Somerset* et *Paquet*, C. B. R. en appel, Québec, 14 décembre 1868, DUVAL, J. en C., CARON, J., BADGLEY, J., MONK, J., et MACKAY, J., 1 R. C., p. 233, et 20 R. J. R. Q., p. 353)
" EN APPEL :—*Vide* PROCÉDURE.
" POUR FRAIS. Le demandeur qui conteste une opposition faite par un tiers à une saisie, pratiquée à sa poursuite, n'est pas tenu de fournir caution pour les frais. (*Webster* vs *Philbrick*, et *Wilkie*, oppt., C. C., Cowansville, 3 mars 1871, RAMSAY, J. A., 15 J., p. 242, et 20 R. J. R. Q., p. 458)
" POUR FRAIS. Le curateur à l'absent, résidant ici, et qui intente une poursuite, n'est pas tenu, à cause de l'absence de celui qu'il représente, de fournir à la partie adverse caution pour la sûreté des frais qui peuvent résulter de sa poursuite. Art. 29 C. C. (*Parent, ès-qualité*, vs *Saint-Jacques*, C. S., Sorel, 31 décembre 1866, LORANGER, J., 2 R. L., p. 91, et 20 R. J. R. Q., p. 497)
" POUR FRAIS. L'intervenant résidant à l'étranger, qui intervient pour prendre le fait et cause du défendeur, est tenu de fournir caution pour les frais. (*Scott et al.* vs *Austin*, et *Young et al.*, intervenants, C. S., Montréal, 31 décembre 1860, MONK, J., 5 J., p. 53 ; 9 R. J. R. Q., p. 23, et 20 R. J. R. Q., p. 287)
" POUR FRAIS. L'opposant à fin de conserver qui réclame les deniers prélevés par la vente d'un immeuble dont il se prétend propriétaire, n'est pas tenu de fournir caution pour les frais. Art. 29 C. C., et arts 128 et 129 C. P. C. (*Dupré* vs *Cantara*, et *Cantara*, oppt., C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 39, et 20 R. J. R. Q., p. 287)
" POUR LES FRAIS. Un opposant à fin de conserver, qui déclare qu'il entend contester l'opposition d'un autre opposant à fin de conserver, a le droit d'obtenir, avant de produire sa contestation, que cet autre opposant qui est désigné dans son opposition comme résidant en dehors de la province, lui fournisse cautionnement pour les frais de la contestation de son opposition. (*Bonacina* vs *Bonacina*, et divers opposants, C. S., Montréal, 17 septembre 1859, BADGLEY, J., 4 J., p. 148; 13 R. L., p. 494; 8 R. J. R. Q., p. 156, et 20 R. J. R. Q., p. 287)

CESSION DE BIENS :—*Vide* LIQUIDATION FORCÉE SOUS L'ACTE DE FAILLITE DE 1864.

" DE BIENS :—*Vide* ACTE DE FAILLITE DE 1869.

" " " VOLONTAIRE. Une cession de biens volontaire faite aux termes du droit commun par un débiteur à ses créanciers sans décharge de leur part, ne dépouille pas ce débiteur de ses droits de propriété. Les créanciers ne sont que des administrateurs, avec droit de disposer des biens cédés dans leur intérêt commun et celui de leur débiteur auquel appartiennent les actions contre les tiers à raison du détournement de ses biens. (*Rivard* vs *Belle*, C. S., Joliette, 21 juin 1866, LORANGER, J., 1 R. L., p. 571, et 20 R. J. R. Q., p. 380)

CERTIORARI. Aux termes de la section 7 du ch. 143 des Statuts du Canada de 1855, 18 Vict., les Commissaires du Havre de Montréal n'ont pas le droit de condamner celui qui a enfreint les règlements qu'ils auraient passés, à l'emprisonnement, comme moyen de le contraindre à payer la pénalité imposée par l'un de ces règlements, et les frais de la condamnation ; ils ne peuvent que condamner le contrevenant à une pénalité ou à l'emprisonnement, ces deux peines étant absolument indépendantes l'une de l'autre ; en conséquence, un règlement des Commissaires du Havre de Montréal, imposant une pénalité et l'emprisonnement à défaut de paiement de la pénalité, est illégal, et la condamnation prononcée en vertu de ce règlement sera cassée sur *certiorari*. (*Rudolph*, requérant *certiorari*, et *Commissaires du Havre de Montréal*, C. S., Montréal, 30 décembre 1856, DAY, J., SMITH, J., et MONDELET, J., 1 J., p. 47 ; 5 R. J. R. Q., p. 424, et 20 R. J. R. Q., p. 93)

" L'article 1231 C. P. C., qui dit que, si la partie adverse n'a pas déjà comparu et produit un acte de comparution en la forme ordinaire, elle peut le faire aussitôt après le rapport régulier du bref ; et que dès ce moment la cause peut être inscrite au rôle par l'une ou l'autre des parties, pour être entendue en la manière ordinaire, n'exige pas absolument une inscription, et le mérite du bref de *certiorari* peut être décidé sans inscription, sur une règle émise pour casser la conviction du tribunal inférieur. (*Marry* vs *Sexton*, C. S., Montréal, 27 octobre 1869, TORRANCE, J., 14 J., p. 101, et 20 R. J. R. Q., p. 91)

" Outre l'inscription au mérite du bref de *certiorari*, il faut encore de la part du requérant une motion pour casser la conviction du tribunal inférieur ; la motion contenant la demande, équivalant aux conclusions de la déclaration. (*Whitehead* et *Brunel*, C. S., Montréal, 28 juin 1870, TORRANCE, J., 14 J., p. 267, et 20 R. J. R. Q., p. 195)

" Une conviction de deux juges de paix, rendue sous les dispositions du ch. 6 des S. R. B. C. de 1861, intitulé : " Acte concernant les Aubergistes et la Vente des liqueurs enivrantes," n'est pas nulle parce que l'inspecteur du revenu poursuivant pour vente de liqueurs sans licence ou contravention à ce statut, n'a pas allégué dans la plainte que le défendeur n'était pas distillateur ni marchand de vins, et n'a pas fait d'autres allégués négatifs que celui que le défendeur n'avait pas la licence exigée par la loi. Il n'est pas absolument nécessaire que la conviction indique le jour précis où l'offense a été commise, *le ou vers tel jour*, suffit. Les juges de paix peuvent aussi ordonner qu'à défaut de meubles suffisants, le défendeur sera emprisonné pendant deux mois à compter du jour de l'incarcération. (*Beau-*

parlant et *Gervais et al.*, C. S. R., Montréal, 30 novembre 1865, BADGLEY, J., BERTHELOT, J., MONK, J. A., confirmant le jugement de C. S., Sorel, 21 juin 1865, LORANGER, J., 1 R. L., p. 467; 16 R. J. R. Q., p. 37, et 20 R. J. R. Q., p. 356)

CERTIORARI:—*Vide* DÉPENS.

" :— " RÈGLEMENT MUNICIPAL.

CHANTRE DANS L'EGLISE:—*Vide* LOUAGE DE SERVICE.

CHARGES DU MARIAGE:—*Vide* BILLET PROMISSOIRE.

" " " :— " FEMME SÉPARÉE DE BIENS.

CHEMINS PUBLICS:—*Vide* RESPONSABILITÉ.

" DE FER:—*Vide* ACTION DANS UNE COMPAGNIE DE CHEMIN DE FER.

CHÈQUE:—*Vide* TESTAMENT.

CHOSE JUGEE. Une poursuite *in rem* intentée contre un vaisseau dans la cour de vice-amirauté, par une compagnie d'assurance, pour la réclamation des frais de sauvetage du vaisseau, et qui n'est pas dénoncée au propriétaire du vaisseau, n'est pas chose jugée vis-à-vis de ce propriétaire quant au délaissement qu'il a fait du vaisseau à la compagnie d'assurance et qu'il prétend que cette compagnie a accepté. Art. 1241 C. C. (*The Provincial Insurance Company of Canada* et *Leduc*, Conseil Privé, 26 juin 1874, confirmant le jugement de C. B. R. en appel, Montréal, 22 mars 1872, DUVAL, J. en C., CABON, J., DRUMMOND, J., BADGLEY, J., dissident, et MONK, J., dissident, qui confirmait le jugement de C. S., Montréal, 31 mars 1870, MACKAY, J., 14 J., p. 273; 19 J., p. 281; 5 R. L., p. 579; 6 L. R. P. C., p. 224, et 20 R. J. R. Q., p. 203)

CODE MUNICIPAL:—*Vide* ELECTION MUNICIPALE.

" " :— " ACTION NÉGATOIRE.

" " :— " CORPORATION MUNICIPALE.

" " :— " PREUVE.

CODICILLE:—*Vide* TESTAMENT.

COLLOCATION:—*Vide* DÉPENS.

COMMISSAIRE DES TERRES DE LA COURONNE:—*Vide* MANDAMUS.

" D'ECOLE. Le paragraphe 5 de la sous-sec. 10 de la sec. 110 du ch. 15 des S. R. B. C., intitulée: "Acte concernant l'allocation provinciale en faveur de l'éducation supérieure,—et les écoles normales et communes," décrétait que les "commissaires et syndics d'école et toutes les personnes chargées de la régie des écoles n'emploieront comme instituteurs que ceux qui sont ainsi munis d'un brevet de capacité donné par l'un des bureaux d'examinateurs comme susdit, sous peine de perdre leur part de l'allocation faite pour l'encouragement de l'éducation." La sec. 125 dudit statut contenait la disposition suivante: "Quiconque est appelé légalement à accepter une charge ou à remplir des fonctions en vertu de cet acte, et refuse d'accepter ladite charge, ou néglige d'accomplir lesdites fonctions ou contrevient volontairement en aucune manière aux dispositions de cet acte, encourra pour chaque telle offense, soit de commission ou d'omission, une amende de pas moins de cinq piastres, ni de plus de dix piastres, suivant la gravité de l'offense, et ce, à la discrétion de la cour ou de l'autorité qui en prend connaissance." Il a été jugé, sous ces dispositions, que les commissaires d'école qui, de bonne foi, ont voté en faveur d'une résolution pour engager un instituteur qui n'était pas muni d'un brevet de capacité, ne sont pas sujets aux pénalités décrétées par la sec. 125; que la loi ne punit pas un membre d'une corporation pour la part qu'il a prise en sa

qualité officielle à l'acte d'une corporation, à moins qu'il ne se soit abrité sous le manteau officiel pour commettre un délit volontaire; que la loi protège le membre d'une corporation pour ses actes officiels; que, pour soutenir une plainte faite en vertu de la sec. 125, il eût fallu alléguer que les commissaires ont commis la contravention volontairement; que, d'ailleurs, il n'est pas défendu absolument aux commissaires d'une municipalité scolaire d'engager un maître d'école non diplômé, mais que le fait d'engager tel maître d'école non diplômé, peut seulement faire perdre la part de l'allocation faite pour l'encouragement de l'éducation. (*Audette* dit *Lapointe et al.* vs *Duhamel*, C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 52, et 20 R. J. R. Q., p. 294)

COMMISSION ROGATOIRE. Lorsque, dans une cause où l'enquête est faite au long par écrit, le défendeur n'a pas fait sa demande par une commission rogatoire, dans les quatre jours qui suivent la clôture de l'enquête du demandeur, il ne peut ensuite obtenir une commission qu'en montrant cause à la satisfaction du tribunal, et l'absence du défendeur à l'étranger n'est pas une cause suffisante. (*Harvey* vs *Phillips*, C. S., Montréal, 22 mai 1869, TORRANCE, J., 14 J., p. 279, et 20 R. J. R. Q., p. 226)

COMMENCEMENT DE PREUVE PAR ECRIT:—*Vide* PREUVE.

COMMUNAUTE DE BIENS. La femme, convaincue du meurtre de son mari, ne perd pas, par cette conviction, la part de la communauté de biens qui existait entre eux. (*Gauthier* vs *Joutras*, C. S., Sorel, 31 mars 1869, LORANGER, J., 1 R. L., p. 473; 2 La Thémis, p. 82, et 20 R. J. R. Q., p. 359)

" DE BIENS. Le prix d'un immeuble propre à l'un des conjoints qui n'entre pas dans la communauté, n'est pas à la charge de cette communauté, et, après le décès de l'époux, propriétaire de cet immeuble, le créancier ne peut s'adresser à l'autre conjoint pour s'en faire payer le capital et les intérêts, mais il doit s'adresser aux héritiers de l'époux décédé. (*Desautels* vs *Larue*, C. S., Sorel, 31 mars 1869 LORANGER, J., 1 R. L., p. 485; 2 La Thémis, p. 90, et 20 R. J. R. Q., p. 367)

" DE BIENS:—*Vide* FEMME MARIÉE.

" " :— " RESPONSABILITÉ.

COMPAGNIE DE CHEMIN DE FER. Une compagnie de chemin de fer peut recouvrer d'un actionnaire, dans son fonds capital, le montant des actions par lui souscrites, quoiqu'elle ait, depuis la souscription de ces actions, et sans le consentement de cet actionnaire ou des actionnaires de sa classe, émis une certaine quantité d'actions privilégiées qui diminuent la valeur des premières actions, et qu'elle a offertes d'abord aux actionnaires avant de les mettre sur le marché. (*The Connecticut and Passumpsic Rivers Railroad Company* vs *Comstock*, C. B. R. en appel, Montréal, 8 mars 1870, CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., confirmant le jugement de C. S., Sherbrooke, 8 juillet 1867, SHORT, J., 1 R. L., p. 589, et 20 R. J. R. Q., p. 392)

" DE CHEMIN DE FER. Une souscription d'actions par un Canadien résidant dans la province de Québec, dans une compagnie de chemin de fer incorporée dans les Etats-Unis d'Amérique, pour y construire un chemin de fer, peut être faite dans les Etats-Unis, sujette à la condition que le chemin soit fait à un endroit déterminé sur la ligne entre le Canada et les Etats-Unis, et lorsque la condition est accomplie, la compagnie peut recouvrer de l'actionnaire, devant les tribunaux de la province de Québec, le montant de sa

souscription; ce contrat étant valide et n'étant pas contre l'ordre public. (*The Connecticut and Passumpsic Rivers Railroad Company* vs *Comstock*, C. B. R. en appel, Montréal, 8 mars 1870, CARON, J., DRUMMOND, J., BADGLEY. J., et MONK, J., confirmant le jugement de C. S., Sherbrooke, 8 juillet 1867, SHORT, J., 1 R. L., p. 589, et 20 R. J. R. Q., p. 392)

COMPAGNIE A FONDS SOCIAL :—*Vide* MAINMORTE.

" INCORPOREE. La sec. 33 du chap. 116 des Statuts du Canada de 1850, 13 et 14 Vict., intitulé : " Acte pour incorporer Peter Patterson, écuyer, et autres, sous le nom de *La compagnie du chemin de fer de Québec et Richmond*," contenait la disposition suivante: "La première assemblée générale des propriétaires pour mettre le présent acte à effet, pourra se tenir aussitôt que quinze cents actions dans ladite entreprise auront été souscrites ; et à telle assemblée générale, les propriétaires, assemblés avec tels procureurs qui seront présents, choisiront treize personnes, dont chacune sera propriétaire d'au moins dix actions dans ladite entreprise, pour être directeurs de ladite compagnie, en la manière ci-après réglée." La première assemblee générale des propriétaires ou actionnaires eut lieu, et les directeurs furent choisis avant que quinze cents actions fussent souscrites. Il a été jugé que la compagnie n'était pas légalement organisée, et qu'un actionnaire poursuivi par la compagnie ainsi organisée pour le paiement des actions par lui souscrites n'était pas tenu de les payer, et qu'il pouvait, comme défense à cette poursuite, invoquer cette illégalité de l'organisation de la compagnie, et qu'il n'était pas tenu de procéder par *quo warranto* ou par la procédure indiquée dans la sec. 8 du ch. 41 des Statuts du Canada de 1849, 12 Vict., intitulé: " Acte pour définir le mode des procédures à adopter dans les cours de justice du Bas-Canada dans les matières relatives à la protection et à la régie des droits de corporation et aux writs de prérogative, et pour d'autres fins y mentionnées." (*La compagnie du chemin de fer de Québec et Richmond* vs *Dawson*, C. C., Québec, 30 juin 1851, DUVAL, J., 1 D. T. B. C., p. 366 ; 3 R. J. R. Q., p. 40, et 20 R. J. R. Q., p. 394)

" INCORPOREE :—*Vide* COMPAGNIE DE CHEMIN DE FER.

COMPARUTION :—*Vide* PROCÉDURE.

COMPENSATION. Dans une action en dommages, le défendeur peut opposer à ces dommages réclamés et non liquidés, une dette liquidée qu'il a contre le demandeur, et le tribunal, en rendant jugement sur le fond, peut déclarer que le montant qu'il accorde au demandeur est compensé par la créance que le défendeur à contre lui. Art. 1188 C. C. (*Belisle* vs *Lyman*, C. S. R., Montréal, 31 janvier 1870, MONDELET, J., MACKAY, J., et TORRANCE, J., 15 J., p. 305, et 20 R. J. R. Q., p. 42)

COMPÉTENCE. Le chap. 7 des Statuts du Bas-Canada de 1801, 41 Geo. 3, intitulé : " Acte pour amender certaines formes de procéder dans les cours de juridiction civile en cette province, et pour faciliter l'administration de la justice," décrétait, sec. 18 : " Que dans tous les cas d'élection et nomination d'un tuteur ou tutrice, curateur ou curatrice, soit à la personne ou aux biens, ou *ad hoc*, homologuée devant un ou plusieurs des juges des cours civiles de cette province, hors des cours, il sera loisible auxdites cours, dans les termes supérieurs seulement, sur requête des plus proches parents, afin de mettre à côté et annuler telles susdites élection et nomination, et après connaissance de cause, ledit tuteur ou tutrice, curateur ou curatrice ayant été entendu, de mettre à côté et annuler tels appointement et nomination pour les

causes prononcées par la loi, et d'ordonner qu'il sera procédé à une nouvelle élection, en la manière et forme ordinaire." Le ch. 38 des Statuts du Canada de 1849, 12 Vict., intitulé : " Acte pour amender les lois relatives aux cours de juridiction civile en première instance, dans le Bas-Canada," décrétait, sec. 74 : " Que la Cour de Circuit et tout juge tenant cette cour à un endroit quelconque, tant en cour que hors de cour, pendant les termes et hors des termes, ou durant la vacance, aura et pourra exercer dans les limites desdits circuits respectivement et concurremment avec les juges de la Cour Supérieure, les mêmes pouvoirs et autorités dont sont revêtus la Cour Supérieure et les juges d'icelle pour vérification de testaments, élection et nomination de tuteurs, curateurs, avis de parents et amis dans les cas où la loi le requiert, clôtures d'inventaires, attestations de comptes, insinuations, apposition et levée des scellés, et l'expédition de tous autres actes de la même nature qui ne souffrent pas de délai, et les procédures en pareil cas formeront partie des records de la Cour de Circuit dans le circuit dans lequel les procédures auront lieu : pourvu toujours, que les nominations et ordres donnés et faits par tout juge en vertu de cette section, pourront être mis de côté, par la Cour Supérieure siégeant dans le district, de la même manière et suivant les mêmes dispositions de la loi en vertu desquelles toutes nominations ou ordres donnés ou faits par un seul juge auraient pu être mis de côté immédiatement avant l'époque de la mise en vigueur du présent acte." Il a été jugé, sous ces dispositions, que la Cour Supérieure a le pouvoir formel de reviser un jugement de la Cour de Circuit ordonnant l'apposition des scellés sur les biens meubles et effets d'une succession. Lorsqu'une testatrice dispose de tous ses biens, en pleine propriété, en faveur de son mari, exemptant ce dernier de l'obligation de faire inventaire, à condition qu'il ne se remarie pas, cas auquel il serait tenu de rendre compte aux héritiers de la testatrice, l'ordre d'un juge de la Cour de Circuit de faire un inventaire avant la levée des scellés apposés sur les meubles et effets d'une succession, à la demande de quelques héritiers, est un jugement rendu dans l'intérêt de toutes les parties et qui ne doit pas être altéré. (*Ex parte Cardinal*, requérant levée des scellés, et *Belinge*, tuteur, C. S., Montréal, 10 mai 1853, DAY, J., SMITH, J., et VANFELSON, J., 3 D. T. B. C., p. 435)

COMPÉTENCE. Le ch 79 des S. R. B. C. de 1861, intitulé : " Acte concernant la Cour de Circuit," décrétait sec. 2 ; " La Cour de Circuit connaîtra, entendra, jugera et décidera toutes les poursuites et actions civiles, tant celles dans lesquelles la Couronne est partie que les autres, (à l'exception de celles qui tombent purement sous la juridiction de l'Amirauté) dans lesquelles la somme d'argent ou la valeur de la chose demandée n'excède pas $200, et dans lesquelles il n'émane pas de bref de *capias ad respondendum*." Aux termes de cette section, la Cour de Circuit est incompétente à connaître d'une action ayant pour objet la réclamation d'une pension alimentaire de $200 par année, pour un espace de temps indéterminé, savoir la vie durant de celui qui la réclame. Art. 1054 C. P. C. (*Smith et ux.* et *Patton*, C. B. R. en appel, Montréal, 7 décembre 1863, LAFONTAINE, J.-P., MEREDITH, J., MONDELET, J., et BADGLEY, J., infirmant le jugement de C. C., 28 mai 1863, LAFONTAINE, J., qui, dans une telle demande, avait accordé $112 par année, 14 D. T. B. C., p. 323 ; 13 R. J. R. Q., p. 52, et 20 R. J. R. Q., p. 192)

COMPÉTENCE. La sec. 4 du ch. 40 des S. R. B. C. de 1861, intitulé: "Acte concernant les locateurs et locataires," telle qu'amendée par la sec. 1 du ch. 12 de S.C. de 1862, 25 Vic., intitulé: " Acte pour amender l'acte concernant les locateurs et locataires," quise lit comme suit: " Les actions en vertu du présent acte seront intentées dans la Cour Supérieure ou de Circuit, pour le montant du loyer ou des dommages réclamés, et les frais seront alloués et taxés suivant le montant du jugement." Jugé, sous les dispositions de cette section et de l'article 1105 C. P. C., que la Cour de Circuit n'est pas compétente pour juger une demande en résiliation d'un bail annuel, lorsque la valeur annuelle du loyer excède $200, quoique le seul montant réclamé dans la poursuite soit moins de $200 pour dommages causés à l'immeuble loué. V. art 1624 C. C. (*McGinnis* vs *Horseman*, C. S. R., Montréal, 25 avril 1870, MACKAY, J., TORRANCE, J., BEAUDRY, J., confirmant le jugement de C. C., Montréal, 29 mars 1870, BERTHELOT, J., 14 J., p. 224, et 20 R. J. R. Q., p. 155)

" Une poursuite concluant à la démolition et à l'enlèvement d'une digue et d'obstructions faites par le défendeur sur un cours d'eau traversant la propriété du demandeur et arrêtant ainsi l'écoulement des eaux de ce terrain, et demandant à être autorisé à faire cette démolition, si le défendeur ne le fait pas dans le délai qui lui serait fixé, et concluant aussi au paiement de la somme de $100 pour dommages, n'est pas de la compétence de la Cour de Circuit, vu que cette poursuite comporte une déclaration de servitude sur le fonds du défendeur, en faveur de celui du demandeur, si le demandeur n'a ni allégué ni prouvé que la valeur de cette servitude ne dépassait pas la somme de $200, de manière à donner juridiction à la Cour de Circuit. Arts 28 et 1054 C. P. C. (*Dorval* vs *Chevalier*, C. S. R., Montréal, 9 juillet 1870, MACKAY, J., TORRANCE, J., BEAUDRY, J., infirmant le jugement de C. C., 26 octobre 1870, 14 J., p. 263, et 20 R. J. R. Q., p. 191)

" Dans le cas où une personne, résidant à Kamouraska, donne, là, à un commis-voyageur représentant une maison de Montréal, un ordre pour des marchandises d'après l'échantillon à lui montré et que cet ordre est accepté ensuite par le marchand à Montréal, et que les effets comptés, pesés et mesurés à Montréal, ont été remis à la compagnie du chemin de fer le Grand-Tronc, adressés à l'acheteur à Kamouraska qui les a reçus là et en a payé le fret conformément aux instructions de l'acheteur de Kamouraska, la vente ne se trouve parfaite qu'après que lesdites marchandises ont été confiées, pesées et mesurées conformément aux articles 1472 et 1474 C.C., et, après cette opération, le droit d'action pour le recouvrement du prix de ces marchandises prend naissance en la cité de Montréal, indépendamment de la livraison; et, suivant l'article 34 C. P. C., l'action peut être portée devant le tribunal de Montréal. (*Thompson et al.* vs *Dessaint*, C. S., Montréal, 21 février 1870, BEAUDRY, J., 14 J., p. 184, et 20 R. J. R. Q., p. 114). Jugé dans le même sens, *Joseph et vir* vs *Paquette*, C. C., Montréal, 1er avril 1870, TORRANCE, J., 14 J., p. 186, et 20 R. J. R. Q., p. 116)

" :—*Vide* JURIDICTION.

COMPLICE :—*Vide* PARJURE.

" :—*Vide* PREUVE EN MATIERE CRIMINELLE.

CONFUSION. Le père qui donne à son fils un immeuble à la charge de lui payer une somme déterminée, avec intérêt, et qui, ensuite, est appelé à la succession de son fils par le décès de

ce dernier, ne peut, sans renoncer à cette succession, réclamer de la veuve du fils décédé, usufruitière de ses biens, par son contrat de mariage, cette somme d'argent que le fils est convenu de lui payer par l'acte de donation, ni les intérêts, vu qu'il y a, dans ce cas, confusion des qualités de créancier et de débiteur. (*Desautels* vs *Larue*, C. S., Sorel, 31 mars 1869, LORANGER, J., 1 R. L., p. 485; 2 La Thémis, p. 90, et 20 R. J. R. Q., p. 367)

CONFISCATION :—*Vide* CAPACITÉ DE CONTRACTER D'UNE PERSONNE ACCUSÉE DE MEURTRE.

CONJOINT SURVIVANT :—*Vide* TESTAMENT.

CONNAISSEMENT :—*Vide* SAISIE REVENDICATION.

CONSEIL DE COMTE :—*Vide* SURINTENDANT SPÉCIAL.

" LOCAL :—*Vide* SURINTENDANT SPÉCIAL.

CONSEILLERS MUNICIPAUX :—*Vide* ELECTION MUNICIPALE.

CONSENTEMENT :—*Vide* PREUVE.

CONSIDERATION DES CONTRATS :—*Vide* OBLIGATION.

CONTESTATION LIEE :—*Vide* PROCÉDURE.

" " La contestation d'une cause est liée par la demande, l'exception et la réponse à l'exception, si la réréponse est générale, et, dans ce cas, le défendeur n'a pas le droit de répliquer. Art. 148 C. P. C. (*Hutchins et al.* vs *Fraser et al.*, C. S. R., Montréal, 31 mai 1870, MACKAY, J., TORRANCE, J., et BEAUDRY, J., confirmant le jugement de C. S., Sherbrooke, 10 décembre 1869, SHORT, J., 14 J., p. 280, et 20 R. J. R. Q., p. 226)

" DE COLLOCATION :—*Vide* DÉPENS.

CONTRAINTE PAR CORPS. Les cautions d'un défendeur arrêté sur *capias* et libéré en vertu d'un cautionnement donné sous l'article 825 C. P. C., sont sujettes à la contrainte par corps pour le montant du cautionnement, dans le cas où elles ne livrent pas le débiteur, après l'expiration d'un mois à compter de la signification qui leur est faite de l'ordre à ce débiteur de se livrer entre les mains du shérif. (*Winning et al.* vs *Leblanc et al.*, C. S., Montréal, 30 septembre 1870, MONDELET, J., 14 J., p. 298, et 20 R. J. R. Q., p. 237)

" PAR CORPS. Un défendeur qui en contravention à la loi a été nommé gardien à une saisie mobilière pratiquée sur lui, ne peut, sur règle *nisi* et sur son défaut de représenter les effets saisis, être condamné à l'emprisonnement pour mépris de cour, arts 560, 590 et 597 C. P. C. (*Patoille* vs *Guilmette*, et *Guilmette*, mis en cause, C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 51, et 20 R. J. R. Q., p. 293)

" PAR CORPS :—*Vide* CAPIAS.

" " :— " DÉTENTEUR DE TERRE HYPOTHÉQUÉE.

" " :— " EXÉCUTION DES JUGEMENTS SUR ACTION PERSONNELLE.

CONVENTIONS MATRIMONIALES :—*Vide* FEMME MARIÉE.

CORPORATION :—*Vide* COMMISSAIRE D'ÉCOLE.

" :—*Vide* MANDAMUS.

" COMMERCIALE ETRANGERE. Par l'article 25 C. C., " l'étranger a droit d'acquérir et de transmettre, à titre gratuit ou onéreux, ainsi que par succession ou par testament, tous biens meubles et immeubles dans le Bas-Canada, de la même manière que le peuvent faire les sujets britanniques nés ou naturalisés." Par l'article 14 C. P. C., toute corporation ou personne, dûment autorisée à l'étranger à ester en jugement, peut exercer cette faculté devant tout tribunal du Bas-Canada. Ces dispositions du code civil et du code de procédure n'ont pas l'effet de placer une corporation étrangère dans une position plus élevée ou meilleure

que celle des corporations coloniales. Par l'ancien droit de la France et de ses colonies, avant l'édit de Louis XV, promulgué dans la colonie en 1743, et en France, en 1749, les corporations ou communautés pouvaient acquérir des terres ou héritages, mais elles n'étaient pas en droit de les retenir toujours. Elles pouvaient être obligées de vider leurs mains de ces héritages, soit par les seigneurs de qui les héritages acquis par elles relevaient, soit par le procureur du roi, à moins qu'elles eussent obtenu du roi des lettres d'amortissement qui les rendissent capables de posséder et retenir ces héritages en indemnisant les seigneurs. Par ces édits de Louis XV faits en 1743 et en 1749, les corporations et communautés furent rendues absolument incapables d'acquérir aucun héritage ou fonds de terre, soit à titre gratuit, soit à titre de commerce. Il n'y a pas de doute que le principal objet de cet édit était de décourager la dotation excessive des maisons religieuses, mais l'édit de 1743 publié dans la colonie était en termes assez larges pour comprendre aussi les corps séculiers. L'article premier, après avoir énuméré les corporations particulières, contient la description générale des *autres corps et communautés ecclésiastiques et laïques*. Et la prohibition d'acquérir des héritages, contenue dans l'article 10, est dirigée contre *les autres gens de mainmorte aussi bien que contre les communautés religieuses*. Aujourd'hui, l'édit de 1743 ne contient pas seul les lois relatives aux gens de mainmorte. Le titre 11 du livre 1 du Code Civil, qui traite des corporations les comprend toutes en ses termes. L'article 364 dit que les corporations sont soumises à des incapacités qui leur interdisent ou qui restreignent à leur égard l'exercice de certains droits, facultés, privilèges et fonctions dont jouissent les personnes naturelles. Ces incapacités résultent de la nature même de l'incorporation, ou bien elles sont imposées par la loi." Ces incapacités résultant de la loi, sont mentionnées dans l'article 366 qui se lit comme suit: " 1° Celles qui sont imposées à chaque corporation par son acte de création ou par une loi applicable à l'espèce à laquelle cette corporation appartient; 2° Celles comprises dans les lois générales du pays touchant les gens de mainmorte et corps incorporés, leur interdisant l'acquisition de biens immeubles ou réputés tels, sans l'autorisation du souverain, excepté pour certaines fins seulement, à un montant et pour une valeur déterminée ; 3° Celles qui résultent des mêmes lois générales d'après lesquelles les gens de mainmorte ne peuvent ni aliéner ni hypothéquer leurs immeubles qu'en se conformant à certaines formalités particulières et exorbitantes du droit commun." Cet article ne refère pas à l'édit, mais aux lois générales du pays, touchant les gens de mainmorte et les corps incorporés, et il déclare les incapacités qui, par la loi générale des mainmortes, affectent toutes les corporations sans distinction. Quelqu'aient pu être les doutes qui ont existé autrefois quant à l'obligation prohibitive de l'ancien droit aux corporations de commerce, ils ont disparu depuis la promulgation du code qui a déclaré que ces anciennes prohibitions de la loi ont constitué et constituent notre droit provincial. Les termes de l'article du code sont trop claires pour admettre une interprétation douteuse; et, dans leur généralité, ils comprennent toutes les corporations séculières, laïques ou commerciales, et il les soumet toutes aux mêmes incapacités d'acquérir des immeubles sans l'autorisation du

souverain ou de la législature. Quelle que soit la valeur des opinions exprimées dans les causes de *Kierzkowski* vs *Le chemin de fer du Grand Tronc du Canada*, l'autorité supérieure du code civil doit maintenant prévaloir. Ainsi une corporation commerciale étrangère ne peut acquérir des immeubles dans la province de Québec sans la permission du souverain ou de la législature; et si une telle corporation étrangère ayant acquis des immeubles dans la province, et en étant évincée, poursuit en garantie l'arrière-garant, elle doit faire voir dans sa déclaration, qu'elle a été autorisée par l'autorité compétente à acquérir des immeubles. Si, à la face de la déclaration, il appert qu'elle est une corporation étrangère, on présumera qu'elle n'est pas autorisée par les lois du pays à acquérir des immeubles; le fait d'une telle autorisation étant un fait qui lui serait personnel, c'est à elle à l'alléguer dans sa demande; et si une déclaration ne contient pas telle allégation, cette demande sera renvoyée sur défense en droit. Si, dans une telle poursuite, la demanderesse ne fait pas telle allégation de l'autorisation qu'elle a obtenue d'acquérir des immeubles, elle pourra par un amendement faire cette allégation après la production de la défense en droit, si le fait existe. (*The Chaudière Gold Mining Company of Boston* et *Desbarats et al.*, Conseil Privé, 29 juillet 1873, confirmant le jugement de C. B. R. en appel, Montréal, 10 décembre 1870, DUVAL, J. en C., dissident, CARON, J., BADGLEY, J., MONK, J., LORANGER, J. *ad hoc*, dissident, qui confirmait le jugement de C. S., Montréal, 31 mai 1869, TORRANCE, J., 1 R. L., p. 82; 13 J., p. 182; 15 J., p. 44; 2 R. L., p. 623; 4 R. L., p. 645; 17 J., p. 275; 1 R. C., p. 120; 5 Law R., P. C., p. 277; 19 R. J. R. Q., p. 244, et 20 R. J. R. Q., p. 300)

CORPORATION ETRANGERE. Le ch. 21 des Statuts du Canada de 1850, 13 et 14 Vict., intitulé: "Acte pour établir le libre commerce de banque en cette province, et pour d'autres fins relatives aux banques et aux affaires de banques," décrétait sec. 5: "Qu'aucune banque incorporée ou ayant son principal bureau, ou le siège de ses affaires, dans un pays en dehors des possessions de Sa Majesté, n'ouvrira, ni ne tiendra un bureau ou lieu d'escompte ou dépôt, ou pour l'émission, mise en circulation ou rachat de ses billets dans cette province, à peine d'une amende de cent louis pour chaque jour où ce bureau ou lieu sera ouvert ou tenu ouvert, et cette amende sera recouvrée et appliquée de la même manière que les amendes imposées par la section précédente." Le ch. 198 des Statuts du Canada de 1853, 16 Vict., intitulé: "Acte pour faciliter l'admission comme preuve des jugements étrangers et de certains affidavits et autres documents, et pour améliorer autrement la loi de la preuve dans le Bas-Canada, décrétait: "6. Lorsque le sceau de tout état étranger, et le certificat du secrétaire ou d'un des secrétaires de tout tel état ou du gouvernement exécutif d'icelui, sera offert dans une cour de justice dans le Bas-Canada pour établir l'existence et la compétence d'une cour, d'une corporation, de membres du clergé, d'un prêtre ou ministre, d'un office ou officier, son identité relativement à tout document public ou à toute autre matière sera considérée comme authentique sans preuve d'icelle, et sera prise et reçue comme preuve *prima facie* du fait qu'on a l'intention d'établir par icelui, que cet état soit une souveraineté séparée, ou un des Etats-Unis d'Amérique ou de toute autre confédération ou union de plusieurs états. 7. Pourvu toujours et

qu'il soit statué, qu'il sera loisible à toute partie à une poursuite ou procédure de nier la vérité d'aucune desdites expéditions, vérifications, certificats ou extraits, et de ce faire par écrit avant la clôture de l'enquête de la part de la partie qui les produira, en quel cas la preuve du contenu de telles expéditions, vérifications, certificats ou extraits en la manière maintenant prescrite par la loi, sera à la charge de telle partie; mais si lesdites expéditions, vérifications, certificats ou extraits, sont prouvés être corrects et vrais au moyen d'une commission rogatoire ou autrement, les frais de telle preuve à être taxés par le juge, seront, à la discrétion de la cour ou juge devant lequel telle poursuite ou procédure aura lieu, payés par la partie qui aura nié comme susdit, quel que soit le jugement final dans la cause; et pourvu de plus, que lorsque la vérité d'aucune desdites expéditions, vérifications, certificats ou extraits sera niée comme susdit, il sera donné caution pour les frais de l'exécution de la commission pour la prouver à la satisfaction de la cour ou du juge par la partie qui en niera la vérité, et dans le délai et pour tel montant que ladite cour ou juge prescrira." Ces deux sections 6 et 7 comportent, dans leurs termes, une reconnaissance du droit qu'a une corporation étrangère d'être admise à poursuivre comme telle. Elles supposent le cas d'une poursuite intentée au nom d'une corporation étrangère et dans laquelle on produit un document, attesté en la forme voulue, comme preuve de son existence. La sec. 6 décrète, d'un côté, que ce document fera preuve *prima facie*, tandis que, de l'autre côté, la sec. 7 permet à la partie adverse d'en nier la vérité, " de ce faire par écrit avant la clôture de l'enquête de la part de la partie qui le produira, etc." C'est là reconnaître formellement le droit d'une corporation étrangère de poursuivre devant nos tribunaux. La prohibition portée contre les banques étrangères par la sec. 5 du ch. 21 des Statuts du Canada de 1850, ne peut pas être interprétée comme entraînant avec elle la négation du droit de poursuivre en ce pays; elle ne fait aucune allusion au droit d'une banque étrangère de poursuivre; elle n'ôte ni ne donne ce droit, et, si ce droit existait auparavant, elle le laisse donc subsister. Le statut de 1853 prouve que ce droit pré-existait, puisqu'il ne fait les règlements qu'il comporte à cet égard qu'en admettant nécessairement son existence. (*Larocque et al.* et *Banque du comté de Franklin*, C. B. R. en appel, Montréal, 1er juin 1858, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J. et CARON, J., confirmant le jugement de C. S., Montréal, 30 septembre 1857, 8 D. T. B. C., p. 328, et 20 R. J. R. Q., p. 400)

CORPORATION ÉTRANGERE. Une compagnie de chemin de fer, incorporée dans les Etats-Unis et autorisée à construire un chemin de fer dans ce dernier pays, peut recevoir dans les Etats-Unis des souscriptions d'actions à son capital, à la condition qu'elle complète son chemin jusqu'à la ligne du Canada, et elle peut poursuivre, dans la province de Québec, l'exécution de ce contrat et le recouvrement des actions ainsi souscrites aux Etats-Unis par un canadien résidant dans la province de Québec. (*Cie de chemin de fer des rivières Connecticut et Passumpsic* et *Comstock*, C. B. R. en appel, Montréal, 8 mars 1870, CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., confirmant le jugement de C. S., Sherbrooke, 8 juillet 1867, SHORT, J., 1 R. L., p. 589, et 20 R. J. R. Q., p. 392)

" ÉTRANGERE :—*Vide* COMPAGNIE DE CHEMIN DE FER.

CORPORATION MUNICIPALE. Lorsqu'un règlement d'un conseil municipal de comté, nomme un comité pour l'acquisition et la construction d'un bureau d'enregistrement,d'une cour de justice et d'une voûte à l'épreuve du feu pour la conservation des archives du bureau d'enregistrement et de la cour de justice, pourvu qu'il n'engage pas la corporation pour une somme plus élevée que celle mentionnée dans le règlement, un contrat fait par ce comité avec un entrepreneur pour la construction d'une bâtisse pour les fins susdites, comprenant une salle publique à l'usage de la paroisse du chef-lieu, est nul, quoique le prix de la construction n'excède pas la somme mentionnée dans le règlement comme devant être la limite de l'obligation de la corporation; cette corporation pouvant avoir d'autres objections que celle du prix à mettre dans cette bâtisse une salle publique. (*Fournier dit Préfontaine* vs *Corporation du comté de Chambly*, C. S., Montréal, 30 septembre 1870, TORRANCE, J., 14 J., p, 295, et 20 R. J. R. Q., p. 233)

" MUNICIPALE. Les corporations municipales sont tenues d'observer strictement les formalités prescrites par la loi pour pouvoir exiger des contribuables le paiement de leurs cotisations et pour émaner contre eux des saisies-exécution aux fins de prélever ces cotisations. Les avis publics et privés remplacent, pour les corporations municipales, les procédures judiciaires qu'il est nécessaire d'adopter pour avoir droit de faire saisir les biens du débiteur ; et sur une poursuite en dommages, par un contribuable, contre la corporation, pour saisie illégale, pour taxes, des biens de ce contribuable, c'est à la corporation à prouver que la saisie était légale et autorisée par l'observation de toutes les formalités voulues par la loi, quand même le demandeur ne se serait pas plaint spécialement du défaut de ces formalités, mais se serait borné à alléguer qu'il avait payé ses taxes et que la saisie était illégale et malicieuse; et une corporation qui aurait ainsi saisi les biens du contribuable sera condamnée à lui payer des dommages, si, sur la poursuite en dommages, pour saisie illégale, elle ne prouve pas qu'elle avait rempli toutes les formalités voulues par la loi. (*Vide* Statuts du Canada de 1864, 27-28 Vic., ch. 60, secs 39, 40, 41 et 42). (*Mathews* vs *Le maire, les échevins et conseillers de la cité de Montréal*, C. B. R. en appel, Montréal, 8 mars 1870, CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., infirmant le jugement de C. S. R., Montréal, 21 novembre 1868, qui confirmait le jugement de C. S., Montréal, 28 mars 1868, 1 R. L., p. 610, et 20 R. J. R. Q., p. 407)

" MUNICIPALE. Une corporation municipale qui, sous l'autorité que lui accorde sa charte, exproprie partie d'un terrain riverain d'une rue, pour l'élargissement de cette rue, doit procéder avec diligence, au rétablissement de cette rue, dans un état convenable, et, si elle laisse la rue dans un état impassable, pendant un temps plus long qu'il ne faut, elle est responsable vis-à-vis de ce propriétaire, en sus de l'indemnité qui lui a été payée pour la partie de terrain expropriée, des dommages qu'il éprouve par suite de cette négligence de la corporation. (*Judah* et *Le maire, les échevins et les citoyens de la cité de Montréal*, C. B. R. en appel, Montréal, 22 juin 1872, CARON, J., BADGLEY, J., MONK, J., et CASAULT, J., infirmant le jugement de C. S., Montréal, 9 juillet 1870, TORRANCE, J., 14 J., p. 269 ; 2 R. C., p. 470, et 20 R. J. R. Q., p. 198)

" MUNICIPALE :—*Vide* PREUVE.

CORPORATION MUNICIPALE:—*Vide* PROHIBITION.
" " :— " VENTE DE PROPRIÉTÉ POUR TAXES MUNICIPALES.
" MUNICIPALE :—*Vide* RÈGLEMENT MUNICIPAL.
" " :— " RESPONSABILITÉ
COUPE DE BOIS. La vente de la coupe et dépouille d'une terre à bois, ne donne pas à l'acquéreur ou à ses ayants cause la coupe et dépouille du bois sur cette terre à perpétuité, mais ne lui donne droit que de couper les arbres qui existaient lors de la vente ; et, sur une action négatoire de la part du propriétaire de la terre, alléguant que l'acquéreur a coupé tout le bois qui existait lors de la vente, une expertise pourra être ordonnée par le tribunal pour constater s'il y a encore sur la terre des arbres qui existaient lors de la vente, et, dans ce cas, la cour fixera un délai pendant lequel l'acquéreur devra couper et enlever ces arbres, et déclarera qu'après la coupe de ces arbres ou le délai pendant lequel il devra les enlever expiré, la servitude de coupe et dépouille de bois sera éteinte. (*Paquette dit Lavallée* vs *Dansereau et vx.*, C. S., 19 mai 1869, BEAUDRY, J., et 30 décembre 1869, MACKAY, J., 14 J., p. 195, et 20 R. J. R. Q., p. 118)
COUR DE CIRCUIT :—*Vide* COMPÉTENCE.
COURS D'EAU :—*Vide* RIVIÈRES NAVIGABLES ET FLOTTABLES.
CREANCE CONDITIONNELLE :—*Vide* VENTE.
CURATEUR A L'ABSENT. Le curateur à l'absent qui a intenté, ès-qualité, une action pétitoire qui a été renvoyée avec dépens parce qu'il n'avait pas qualité pour intenter telle action, pourra, dans une poursuite subséquente intentée par le défendeur sur la première action, être condamné personnellement à payer les dépens de l'action pétitoire, quoique dans la première action, le défendeur, sur la première action, demandeur sur la dernière action, ait demandé dans la première action, une condamnation personnelle aux dépens contre lui, qui n'a pas été accordée. (*Saint-Jacques* vs *Parent*, C. C., Sorel, 30 mai 1868, LORANGER, J., 2 R. L., p. 95, et 20 R. J. R. Q., p. 500)
" A L'ABSENT :—*Vide* ACTION PÉTITOIRE.
CURE :—*Vide* LOUAGE.

D

DÉCLARATION DE TIERS-SAISI:—*Vide* SAISIE-ARRÊT APRÈS JUGEMENT.
DÉCRET. Le fait qu'un shérif se serait, par personne interposée, porté adjudicataire d'un immeuble vendu par lui, ne rend pas le décret nul de plein droit, mais seulement annulable. Art. 676 C. P. C., et art 1484 C. C. (*Armstrong* vs *Barrette*, et *Crebassa*, oppt, C. S. R., Montréal, 31 mai 1870, MACKAY, J., TORRANCE, J., et BEAUDRY, J., 2 R. L., p. 98, et 20 R. J. R. Q., p. 413)
" Une saisie d'immeuble ne sera pas invalidée parce que les annonces et criées à la porte de l'église n'auraient pas été faites sur le bref de *fieri facias*, ces annonces ne servant, lorsqu'il y a une opposition au bref de *fieri facias*, que dans le cas où l'opposition est décidée avant le jour fixé pour la vente ; lorsque les annonces et criées à la porte de l'église n'ont pas été faites, mais que les autres formalités prescrites par la loi ont été observées, le saisissant n'est pas tenu de recommencer la saisie et les annonces dans la *Gazette Officielle*, mais peut procéder à la vente de l'immeuble saisi sur un bref de *Venditioni Exponas*, en observant les formalités ordinaires de cette procédure. Dans ce dernier

cas, le saisi ou tout autre peut produire une opposition à la saisie, parce que la défense de produire des oppositions à fin d'annuler, à fin de distraire, ou à fin de charge, sur un bref de *Venditioni Exponas*, pour des causes antérieures à ce bref, ne s'applique qu'au cas où les annonces et criées à la porte de l'église ont été faites sur le bref de *Fieri Facias*. Le saisi est tenu de se pourvoir contre les nullités de procédures antérieures à la vente par opposition formée en temps utile, et ces nullités sont couvertes par le consentement tacite du saisi, s'il laisse procéder à la vente sans s'y opposer. Arts 650, 653, 663 et 664 C. P. C. (*Bouvier* et *Brush et al.*, C. B. R. en appel, Montréal, 8 mars 1870, CARON, J., DRUMMOND, J., LORANGER, J., et JOHNSON, J., confirmant le jugement de C. S. R., Montréal, 30 décembre 1865, BADGLEY, J., MONK, J., et BERTHELOT, J. (*dissident*), qui avait confirmé le jugement de C. S., Montréal, 30 juin 1865, MONK, J., 10 J., p. 194; 1 L. C. L. J., p. 110; 1 R. L., p. 641; 15 R. J. R. Q., p. 159, et 20 R. J. R. Q., p. 416)

DÉCRET:—*Vide* ÉXÉCUTION DES IMMEUBLES.

" :— " OPPOSITION A FIN D'ANNULER.

DÉFENSE EN DROIT:—*Vide* PROCÉDURE.

DEMANDE DE PLAIDOYER:—*Vide* PROCÉDURE.

DELAISSEMENT:—*Vide* ASSURANCE MARITIME.

DELIT:—*Vide* RÉCUSATION DES JURÉS.

" :—*Vide* RESPONSABILITÉ

DÉLIVRANCE:—*Vide* VENTE.

DEPENS. Lorsque deux créanciers produisent en même temps chacun une contestation d'une créance colloquée par jugement de distribution, et que le créancier colloqué, ayant été payé longtemps avant la vente de l'immeuble, admet les contestations, il sera ordonné que les frais d'une seule contestation soient pris sur la somme et partagés entre les deux contestants. (*Cournoyer* vs *Plante*, C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 38, et 20 R. J. R. Q., p. 286)

" Une motion pour bref de *certiorari* d'un jugement rendu par des juges de paix, siégeant sous les dispositions du ch. 6 des S. R. B. C. de 1861, intitulé: "Acte concernant les aubergistes et la vente des liqueurs enivrantes," peut être renvoyée avec dépens en faveur des juges de paix qui seuls ont comparu par un avocat sur cette motion. (*Beauparlant* vs *Gervais et al.*, C. S. R., Montréal, 30 novembre 1865, BADGLEY, J., BERTHELOT, J., et MONK, J. A., confirmant le jugement de C. S., Sorel, 21 juin 1865, LORANGER, J., 1 R. L., p. 467; 16 R. J. R. Q., p. 37, et 20 R. J. R. Q., p. 356)

" Les créanciers qui font apposer les scellés doivent en supporter les dépens comme de toute autre mesure conservatoire. (*Gauthier* vs *Joutras, ès-qualité*, C. S., Sorel, 31 mars 1869, LORANGER, J., 1 R. L., p. 473: 2 La Thémis, p. 82, et 20 R. J. R. Q., p. 359)

" Lorsqu'un demandeur a intenté, comme appelable, une cause qui, de sa nature, ne l'est pas, et que le défendeur a consenti à la plaider comme telle, en faisant les procédures comme dans une cause appelable, le mémoire de frais du demandeur qui réussit contre le défendeur devra être taxé comme dans une cause appelable. (*La corporation de la paroisse de St-Aimé* vs *Colnoir*, C. C., Richelieu, 25 novembre 1868, LORANGER, J., 1 R. L., p. 666, et 20 R. J. R. Q., p. 421)

" .—*Vide* RENONCIATION A SUCCESSION.

" :— " REVISION.

" :— " SAISIE-REVENDICATION.

" :— " TRANSACTION.

DEPENSES DE MENAGE :—*Vide* FEMME SÉPARÉE DE BIENS.

DEPOT. Lorsque, du consentement des parties dans une cause, un ordre est émané du tribunal ordonnant le dépôt d'une somme d'argent dans une banque, à intérêt, au nom du protonotaire, pour être ensuite payée sur l'ordre du tribunal, le protonotaire n'a pas le droit de garder pour lui l'intérêt sur ce dépôt, et il doit remettre cet intérêt avec le capital à la personne à qui le jugement du tribunal ordonne que le montant du dépôt soit payé. (*Butters* vs *La Banque de Montréal*, et *Steele et al.*, intervenants, C.S., Montréal, 30 juin 1869, BERTHELOT, J., 14 J., p. 266, et 20 R. J. R. Q., p. 194)

DESISTEMENT. Le demandeur, dans une cause de circuit appelable, qui fait une motion pour le rejet d'une exception à la forme, parce qu'elle aurait été produite après le délai de quatre jours mentionné dans l'article 1070 C. P. C., et qui, ensuite, sans faire aucune réserve répond au mérite de l'exception à la forme, est présumé se désister de sa motion pour le rejet de cette exception. (*Copland et al.* vs *Cauchon et al.*, C. S., Montréal, 15 décembre 1869, TORRANCE, J., 14 J., p. 242, et 20 R. J. R. Q., p. 171)

" :—*Vide* TRANSACTION.

DETENTEUR DE TERRE HYPOTHEQUEE. Le débiteur ou détenteur de terre hypothéquée qui, sans intention de frauder ses créanciers, mais dans le but d'améliorer sa propriété, enlève de la terre hypothéquée une bâtisse pour la mettre sur un autre terrain lui appartenant, perd par là le bénéfice du terme conformément à l'article 1092 C. C., mais il ne peut être condamné à payer des dommages, avec contrainte par corps, sous les dispositions des articles 2054, 2055, 2272 C. C. (*Armstrong* vs *Barrette*, C. C., Richelieu, 31 mai 1868, LORANGER, J., 1 R. L., p. 645, et 20 R. J. R. Q., p. 411)

DISTRACTION DE FRAIS :—*Vide* TRANSACTION.

DISTRIBUTION DES DENIERS D'UN INSOLVABLE RESIDANT A L'ETRANGER. Les biens et deniers d'un insolvable résidant à l'étranger qui sont saisis en cette province, doivent être distribués par les tribunaux de cette province suivant les lois en force ici, et le syndic à la faillite de l'insolvable nommé à l'étranger, n'a pas le droit d'avoir possession de ces biens et deniers pour les distribuer à l'étranger suivant les lois de la résidence de l'insolvable. (*The Canadian Inland Steam Navigation Co.* vs *The Columbian Insurance Company of New-York*, et *La Banque de Montréal et al.*, T. S., et *Benegale Leffingwell et al.*, intervenants, C. S. R., Montréal, 30 avril 1869, MONDELET, J., BERTHELOT, J., et BEAUDRY, J., confirmant le jugement de C. S., 30 mai 1868, MONK, J., 1 R. L., p. 190, et 20 R. J. R Q., p. 3 8)

" DE DENIERS PRELEVES :—*Vide* DÉPENS.

DOMAINE PUBLIC :—*Vide* RIVIÈRES NAVIGABLES ET FLOTTABLES.

DOMMAGES :—*Vide* RESPONSABILITÉ.

DONATION. La donation de deux terres et d'une quantité de biens meubles énumérés dans l'acte qui la constate est apparemment une donation à titre particulier, et le créancier qui réclame des donataires le montant des dettes du donateur, doit prouver que cette donation comprend tous les biens du donateur, et, partant, qu'elle est universelle, et, s'il ne fait cette preuve, les donataires ne seront pas condamnés à lui payer cette créance. Arts 780 et 799 C. C. (*Paquin* vs *Bradley et al.*, C. S., Montréal, 31 janvier 1870, MONDELET, J., 14 J., p. 208, et 20 R. J. R. Q., p. 132)

" D'EFFETS MOBILIERS. Une donation faite en 1863, avant le code et enregistrée, par une mère à ses filles, d'objets

mobiliers se trouvant dans le domicile commun, avec rétention d'usufruit par la donatrice pendant sa vie, et sans déplacement des objets donnés, est sans effet vis-à-vis des créanciers postérieurs à cette donation et à cet enregistrement pour du bois de chauffage fourni pour l'usage du domicile commun. (*Demers* vs *Lefebvre*, et *Vandal et al.*, opts, C. C., Montréal, 15 mars 1870, TORRANCE, J., 14 J., p. 241, et 20 R. J. R. Q., p. 170)

DONATION ENTRE-VIFS. Une donation entre-vifs reçue devant notaire n'est pas nulle parce que ce notaire souffrirait de cécité ou de faiblesse de vue au point de l'empêcher de lire lui-même l'acte de donation et ne pourrait que signer l'acte. Celui qui attaque une semblable donation ne peut invoquer la cécité ou la faiblesse de la vue du notaire instrumentaire comme moyen de nullité de l'acte de donation sans en nier la sincérité. (*Raiche* vs *Alie*, C. S., Sorel, 28 novembre 1869, LORANGER, J., 1 R. L., p. 77, et 20 R. J. R. Q., p. 297)

" ENTRE-VIFS. Une donation consentie entre-vifs n'est pas nulle comme réputée à cause de mort, quoiqu'elle soit faite pendant la maladie du donateur et quelques jours avant la mort de ce dernier, s'il est constaté que le donateur n'est pas mort de la maladie dont il souffrait lors de la donation, et que la cause déterminante de la mort ne s'est déclarée que depuis la donation; et c'est à celui qui attaque une telle donation à prouver que lors de la donation, le donateur était attaqué d'une maladie réputée mortelle. Art. 762 C. C. (*Raiche* vs *Alie*, C. S., Sorel, 28 novembre 1869, LORANGER, J., 1 R. L., p. 77, et 20 R. J. R. Q., p. 297)

" ENTRE-VIFS :— *Vide* SUBSTITUTION.

DOUAIRE PREFIX. Lorsqu'il est stipulé, dans un contrat de mariage, que la femme aura le droit de réclamer le douaire préfix, arrivant la dissolution de la communauté *par mort ou autrement*, la femme a droit de réclamer ce douaire après la séparation de biens obtenue en justice. Art. 1438 C. C. (*Parent* vs *De Tonnancour*, C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 50, et 20 R. J. R. Q., p. 293)

DOUANES :— *Vide* DROIT DE DOUANE.

DROIT D'ACTION :— *Vide* VENTE DE PROPRIÉTÉ POUR TAXES MUNICIPALES.

" DE DOUANE. Sous les dispositions des sections 12, 13, 15, 16, 24, 26 et 79 du ch. 31 des Statuts du Canada de 1847, 10 et 11 Vict., intitulé : " Acte pour abroger et réfondre les droits de douane actuels en cette province, et pour d'autres fins y mentionnées ;" des sections 1, 2, 3, 6, 8, 9, 15 et 29 du ch. 1 des Statuts du Canada de 1849, 12 Vict., intitulé : " Acte pour amender la loi relative aux droits de douane ;" et des sections 3, 5 et 8 du ch. 85 des Statuts du Canada de 1853, 16 Vict., intitulé : " Acte pour amender de nouveau les lois relatives aux droits de douane," les droits, imposés sur les importations de marchandises d'un pays étranger en cette province, peuvent être chargés d'après la valeur des marchandises à l'époque de leur achat, ou d'après leur valeur à l'époque de leur exportation dans le cas d'une augmentation de leur valeur pendant l'intervalle de temps qui s'est écoulé entre leur achat et leur exportation. (*Moffatt et al.* vs *Bouthillier*, C. B. R. en appel, Montréal, 4 juillet 1855, LAFONTAINE, J. en C., AYLWIN, J. (*dissident*), DUVAL, J., et CARON, J., confirmant le jugement de C. S., Montréal, 21 mars 1854, 5 D. T. B. C., pp. 235 et 305, et 20 R. J. R. Q., p. 85)

" DE DOUANE. Par la sec. 23 du ch. 17 de S. R. C. de 1859 intitulé : " Acte concernant les droits de douane et leur

perception," le gouverneur était autorisé à nommer des évaluateurs pour l'évaluation des effets soumis aux droits *ad valorem* dans tels ports d'entrée et tels lieux que le gouverneur désignera, et que s'il n'était pas nommé d'évaluateur dans un port d'entrée, le percepteur audit port agirait en qualité d'évaluateur. Les sections 23 à 32 inclusivement de ce statut indiquent la manière de faire l'évaluation des effets importés soumis aux droits de douane *ad valorem*, et la sec. 33 se lit ainsi qu'il suit: " Si l'importateur, le propriétaire ou consignataire ou agent qui s'est conformé aux prescriptions du présent acte, n'est pas satisfait de l'évaluation de tels effets faite comme susdit,—il pourra donner incontinent avis par écrit de sa désapprobation au percepteur, lequel, sur réception dudit avis, choisira deux marchands discrets et expérimentés, sujets de Sa Majesté, et familiers avec la nature et la valeur des effets en question, pour examiner et vérifier ladite évaluation, conformément aux dispositions qui précèdent, et s'il ne sont de même avis, le percepteur décidera entre eux; et l'évaluation ainsi faite sera finale et conclusive, et les droits seront prélevés en conséquence; 2. Lesdits marchands auront droit chacun à la somme de cinq piastres qui leur sera payée par la partie qui n'aura pas été satisfaite de la première évaluation, si la valeur établie par la seconde évaluation est plus forte que celle qui aura été établie par la première, ou lui est égale, ou si la valeur constatée par la seconde évaluation excède de dix pour cent ou plus la valeur pour le paiement des droits, telle qu'elle apparaitra par la facture et la feuille d'entrée,—autrement ladite somme leur sera payée par le percepteur à même les deniers publics qu'il aura en main, et il la portera sur ses comptes: 3. Tout marchand choisi pour faire une évaluation prescrite en vertu du présent acte, qui, après avoir été dûment notifié par écrit de ce choix, refusera ou négligera de faire ladite évaluation, sera passible, pour tel refus ou négligence, d'une pénalité de quarante piastres, avec les frais; 4. Si la vraie valeur, pour le paiement des droits sur des effets estimés et évalués comme susdit, excède de vingt pour cent ou plus la valeur pour le paiement des droits, telle qu'elle apparait par la facture et la feuille d'entrée d'iceux, alors il sera prélevé et perçu sur lesdits effets, en sus du droit qu'ils auraient payé, s'ils eussent été estimés à leur juste valeur, un nouveau droit égal à la moitié du droit qui eût été payable; et la valeur des effets pour le paiement des droits ne sera jamais estimée à moins que la valeur pour le paiement des droits, telle qu'elle apparaît par la facture et la feuille d'entrée." Il a été jugé, sous ces dispositions, que les droits de douane *ad valorem* sur les marchandises importées dans la province devaient être chargés sur la valeur des marchandises au moment de l'exportation, et non au temps de l'achat, si, entre la date de l'achat et la date de l'exportation, la valeur des marchandises a changé, et que l'importateur de marchandises qui n'est pas satisfait de l'évaluation des marchandises importées faite par le percepteur des douanes pouvait, après avoir payé sous protêt les droits exigés par le percepteur, recouvrer de ce dernier personnellement l'excèdent des droits qui n'aurait pas dû être chargé, quoiqu'il n'ait pas demandé une nouvelle évaluation des marchandises importées sous la sec. 33 du ch. 17 des S. R. C. de 1859. (*Rooney* et *Lewis*, ès-qualité, C. B. R. en appel, Montréal, 21 mars 1872, DUVAL, J. en C. (*dissident*), CARON, J.

(*dissident*), BADGLEY, J., DRUMMOND, J., et MONK, J., infirmant le jugement de C. S. R., Montréal, 28 février 1870, MONDELET, J., MACKAY, J., et TORRANCE, J., qui avait infirmé le jugement de C. C., Montréal, BERTHELOT, J., 14 J., p. 155; 2 R. L., p. 187; 2 R. C., p. 232, et 20 R. J. R. Q., p. 81)

DROIT INTERNATIONAL:—*Vide* DISTRIBUTION DES DENIERS D'UN INSOLVABLE A L'ÉTRANGER.

E

ÉCOLE COMMUNE:—*Vide* COMMISSAIRE D'ÉCOLE.

EDUCATION:—*Vide* COMMISSAIRE D'ÉCOLE.

EGLISE:—*Vide* LOUAGE DE SERVICE.

" UNIE D'ANGLETERRE ET D'IRLANDE:—*Vide* QUO WARRANTO.

ELECTION MUNICIPALE. Le § 1 de la sec. 33 du ch. 24 des S. R. B. C. de 1861, intitulé: "Acte concernant les municipalités et les chemins dans le Bas-Canada," décrète: "Une assemblée publique des habitants habiles à voter se tiendra dans chaque municipalité locale le second lundi de janvier mil huit cent soixante, à dix heures de l'avant-midi, et le même jour et à la même heure, chaque deuxième année ensuite, pour l'élection générale des conseillers locaux." Le § 9 de cette section, ajoute: "S'il y a plus de sept candidats à une élection, le président enregistrera, ou fera enregistrer dans un livre de poll, tenu à cet effet, les voix des électeurs présents, et il déclarera dûment élus conseillers, les sept candidats qui auront obtenu le plus grand nombre de voix; et lorsque l'élection n'est pas contestée par plus de trois électeurs habiles à voter, la personne qui la présidera déclarera les candidats dûment élus." Le § 5 de la sec. 62 de ce statut dit: "Toute personne qui vote à une élection de conseillers municipaux, sans avoir, lorsqu'elle donne son vote à cette élection, les qualités requises par la loi pour lui donner droit de voter à l'élection, encourra par ce fait une amende de vingt piastres." *Jugé*, sous ces dispositions, que lorsque sept candidats seulement sont présentés à une élection municipale et sont déclarés élus par le président, il n'est plus au pouvoir de celui-ci d'accorder un poll à la demande d'électeurs survenant après la proclamation de l'élection des sept premiers candidats et qui, non satisfaits de cette élection, proposent de nouveaux candidats, et que si ce poll est ensuite ainsi accordé illégalement, toute personne qui vote à une telle élection, sans avoir les qualités requises par la loi, n'encourra par ce fait aucune amende. (*Melançon* vs *Sylvestre*, C. C., St-Hyacinthe, 23 mars 1870, SICOTTE, J., 14 J., p. 217, et 20 R. J. R. Q., p. 144)

ELECTEUR MUNICIPAL:—*Vide* ELECTION MUNICIPALE.

EMPHYTEOSE. Les droits d'un bailleur emphytéotique peuvent être saisis et décrétés comme un immeuble par ses créanciers. Dans ce cas, le domaine direct seul est saisi et vendu, et le décret n'affecte pas les droits de l'emphythéote ou preneur qui a le domaine utile, et ne change en aucune manière les conditions de l'emphythéose. Seulement l'emphythéote change de créanciers et doit payer le canon emphythéotique à l'adjudicataire, au lieu de le payer à son bailleur comme avant le décret. (*Précourt* vs *Vidal*, C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 42, et 20 R. J. R. Q., p. 288)

ENFANT:—*Vide* SUBSTITUTION.

" DE CHŒUR:—*Vide* LOUAGE DE SERVICES.

ENREGISTREMENT. Sous les dispositions des sections 1, 5 et 6 du ch. 37 des S. R. B. C. de 1861, intitulé : " Acte concernant l'enregistrement des titres des immeubles, et des charges dont ils sont grevés, — les lois hypothécaires, le douaire et les biens de la femme mariée,—et le transport des terres tenues en soccage," qui sont reproduites dans les articles 2088, 2089 et 2098 C. C., l'acquéreur d'un immeuble par titre enregistré et qui en a pris possession, ne peut être troublé par un acquéreur antérieur adjudicataire à une vente municipale faite sur son vendeur, mais dont le titre n'a pas été enregistré et qui n'a pas pris possession de l'immeuble. (*Caya* vs *Pellerin*, C. S., Arthabaska, 23 mai 1870, POLETTE, J., 2 R. L., p. 44, et 20 R. J. R. Q., 489)

" De droit commun, l'intérêt suit le rang de l'hypothèque ou privilège attaché au capital qui le produit. Il n'en est autrement que lorsqu'il en est ainsi ordonné par quelque loi particulière spécialement décrétée à cet effet, et cette loi, lorsqu'elle existe, doit être restreinte dans sa stricte limite, et ne doit pas être étendue aux cas qu'elle n'a pas prévus. Les clauses 37 et 38 du ch. 37 des S. R. B. C. de 1861, intitulé : " Acte concernant l'enregistrement des titres des immeubles, et des charges dont ils sont grevés,—les lois hypothécaires,—le douaire et les biens de la femme mariée,—et le transport des terres tenues en soccage," contiennent des dispositions de l'espèce sus-mentionnée, et ayant l'effet de changer la loi commune pour un cas particulier, savoir pour le cas où deux créanciers hypothécaires se présentent par concurrence à la distribution du produit d'un immeuble qui leur est hypothéqué, décrétant que le créancier antérieur aura, sur celui qui est postérieur, préférence à l'encontre de ce dernier que pour deux années seulement d'intérêt et pour l'année courante, à moins d'un enregistrement spécial de la part de ce créancier antérieur. Ces dispositions ne sauraient, d'après leur nature, être étendues à d'autres cas qu'à celui qui est mentionné, ni appliquées au cas du détenteur d'un immeuble poursuivi hypothécairement par un créancier hypothécaire. Ainsi, le créancier hypothécaire, qui a enregistré son hypothèque sur l'immeuble, peut le poursuivre, par action en déclaration d'hypothèque, dans les mains d'un tiers détenteur, et réclamer sur l'immeuble de ce dernier, le capital de son obligation enregistrée, et tous les intérêts qui ne sont pas prescrits, quoiqu'il n'ait pas enregistré de bordereau spécial des arrérages d'intérêt excédant deux ans et l'année courante. Les formalités d'enregistrement d'un bordereau d'intérêt d'arrérages non-prescrits au-delà de deux ans et l'année courante, n'ayant l'effet de changer la loi commune que pour ces cas particuliers, ne s'appliquent qu'au cas où deux créanciers hypothécaires se présentent pas concurrence à la distribution du prix d'un immeuble vendu en justice. *Vide* sec. 16 de de l'ordonnance du conseil spécial, 4 Vict., ch. 30; statut du Canada de 1843, 7 Vict., ch. 22, sec. 10; arts 2056, 2061, 2122, 2124 et 2125 C. C. (*MacDonald et al.* et *Nolin*, C. B. R. en appel, Montréal, 9 décembre 1869, CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., infirmant le jugement de C. S., St-Jean, 20 novembre 1868, SICOTTE, J., 14 J., p. 125; 2 R. L., p. 183; 3 R. L., p. 358, et 20 R. J. R. Q., p. 30)

" :—*Vide* DONATION D'EFFETS MOBILIERS.

" :— " VENTE DE CRÉANCE.

" DES VAISSEAUX NAVIGUANT A L'INTERIEUR. Le vendeur d'un vaisseau naviguant à l'intérieur, dont l'acte de

vente n'a pas été enregistré, ne peut, au bénéfice de l'acquéreur, faire une opposition à fin de distraire à une saisie-exécution pratiquée sur ce vaisseau, vu que son titre étant déclaré nul par la loi, il ne peut, s'appuyant sur ce titre, et invoquant son obligation de garant de la vente, faire cette opposition. Statut du Canada de 1845, 8 Vict., ch. 5, secs 13 et 16; Statuts refondus du Canada de 1859, ch. 41, secs 13 et 16; arts 2360 et 2361 C. C. (*Calvin et al.* vs *Tranchemontagne et al.*, C. S., Montréal, 31 mars 1870, TORRANCE, J., 14 J., p. 210, et 20 R. J. R. Q., p. 134)

ENREGISTREMENT DES VAISSEAUX NAVIGUANT A L'INTERIEUR. Le collecteur du port où le certificat de propriété d'un vaisseau a été accordé, doit, lorsqu'on lui présente un acte de vente de ce vaisseau, l'enregistrer sous les dispositions de la sec. 16 du ch. 41 des Statuts refondus du Canada de 1859 intitulé: "Acte concernant l'enregistrement des vaisseaux naviguant à l'intérieur," quoiqu'on ne lui ait pas en même temps produit le certificat de propriété. Le défaut par le collecteur d'enregistrer de suite un acte de vente qui lui est remis par l'acquéreur n'a pas l'effet d'affecter le titre de cet acquéreur. Il n'est pas nécessaire d'enregistrer au bureau du collecteur des douanes la quittance d'une dette pour la garantie de laquelle le vaisseau avait été transporté, par forme de nantissement ou cession en fidéicommis sous les dispositions de la sec. 23 dudit statut (*Moore* vs *The Home Insurance Company*, C. S., Montreal, 30 décembre 1869, MACKAY, J., 14 J., p. 77, et 20 R. J. R. Q., p. 20)

" DES VAISSEAUX NAVIGUANT A L'INTERIEUR:—*Vide* ASSURANCE MARITIME ET CONTRE L'INCENDIE D'UN VAISSEAU ENREGISTRÉ.

ENQUETE. Avant de pouvoir examiner un témoin sur un écrit sous seing privé, dont une copie seulement est soumise au témoin, comme étant une copie exacte de cet écrit, on doit faire voir pourquoi l'original de l'écrit n'est pas produit; cette preuve n'étant pas la meilleure. Art. 1204 C. C. (*The Glen Brick Company* vs *Shackell*, C. S., Montréal, 31 mars 1870, TORRANCE, J., confirmant la décision à l'enquête de BERTHELOT, J., 14 J., p. 238, et 20 R. J. R. Q., p. 169)

" Lorsqu'un demandeur, dans son enquête sur sa demande, a produit des témoins et les a examinés pour repousser le plaidoyer du défendeur, il ne peut, ensuite, après que le défendeur a fait son enquête, produire en contre-preuve des témoins sur les mêmes faits. (*Mathews* vs *The Northern Assurance Company*, C. S., Montréal, 31 décembre 1870, TORRANCE, J., 16 J., p. 82; 4 R. L., p. 67, et 20 R. J. R. Q., p. 43)

" La requête demandant sous l'article 240 C. P. C., l'interrogatoire immédiat d'un témoin sur le point de quitter la province, ne peut être accordée par la Cour Supérieure pendant que le dossier est devant la Cour de Revision sur inscription en revision d'un jugement interlocutoire rendu dans la cause. (*Saint-Gemmes dit Beauvais* vs *de Montigny*, C. S., Montréal, 22 octobre 1868, TORRANCE, J., 12 J., p. 343; 17 R. J. R. Q., p. 452, et 20 R. J. R .Q., p. 29)

" :—*Vide* ASSIGNATION DES TÉMOINS.

" :— " OBLIGATION.

ÉPOUX :— " CAPACITÉ DE CONTRACTER D'UNE PERSONNE ACCUSÉE DE MEURTRE.

" :—*Vide* COMMUNAUTÉ DE BIENS.

" :— " TESTAMENT.

ERREUR:—*Vide* LETTRE DE GARANTIE

ERREUR :—*Vide* PREUVE.
" :— " VENTE DE CRÉANCE.
EXCEPTION DE CUMUL :—*Vide* TESTAMENT.
" DILATOIRE :—*Vide* TESTAMENT.
" A LA FORME. Lorsqu'après la production d'une exception à la forme, fondée sur ce que la copie de la déclaration n'était point certifiée, le demandeur a obtenu la permission de signifier une nouvelle copie au défendeur, en payant les frais encourus jusqu'alors sur l'exception à la forme, le défendeur ne doit plus procéder sur cette exception, et il ne peut l'inscrire à l'enquête et au mérite, vu qu'elle est devenue caduque et inutile par le jugement permettant la signification de la nouvelle copie de la déclaration. (*Mallette* vs *Tremblay*, C. S., Montréal, 30 novembre 1869, MACKAY, J., 14 J., p. 209, et 20 R. J. R. Q., p. 133)
" A LA FORME :—*Vide* DÉSISTEMENT.
" " :— " PROCÉDURE.
" PRÉLIMINAIRE. Dans les causes de la Cour de Circuit, au-dessous de $60, le plaidoyer contenant une exception préliminaire doit être reçu sans dépôt, les règles de pratique n'exigeant aucun dépôt dans ce cas. (*Alie* vs *Hamelin*, C. C., Saint-François-du-Lac, 1er juin 1869, LORANGER, J., 14 J., p. 134 ; 2 R. L., p. 184, et 20 R. J. R. Q., p. 40)
EXÉCUTION DES IMMEUBLES. Si l'enchère du dernier enchérisseur est refusée, même sans raison légale, et si l'immeuble est adjugé à un autre, le dernier enchérisseur dont l'enchère est refusée se trouve libéré de son enchère ; et si l'adjudication de l'immeuble faite à une autre personne, comme susdit, est ensuite déclarée nulle par le tribunal, le dernier enchérisseur dont l'enchère aura ainsi été refusée, ne pourra ensuite être obligé de prendre l'immeuble, et on ne pourra le revendre à sa folle-enchère. Art. 674 C. P. C. (*Morrison* vs *Cyr*, et *Perron*, mis en cause, C. S. R., Montréal, 31 mai 1870, MACKAY, J., TORRANCE, J., et BEAUDRY, J., infirmant le jugement de C. S., Iberville, 19 novembre 1869, 14 J., p. 265, et 20 R. J. R. Q., p. 193)
" DES IMMEUBLES. Si un enchérisseur, lors d'une première enchère, déclare sa résidence au shérif, il n'est pas tenu de renouveler cette déclaration de résidence à chaque enchère subséquente. Art. 674 C. P. C. (*Morrison* vs *Cyr*, C. S. R., Montréal, 31 mai 1870, MACKAY, J., TORRANCE, J., et BEAUDRY, J., confirmant le jugement de C. S., Iberville, 14 J., p. 265, et 20 R. J. R. Q., p. 193)
" DES JUGEMENTS :—*Vide* SAISIE-ARRÊT APRÈS JUGEMENT.
" " " SUR ACTION PERSONNELLE. Le créancier qui a obtenu jugement, peut saisir les biens de son débiteur en même temps qu'il le fait emprisonner dans les causes où il y a lieu à la contrainte par corps. Art. 554 C. P. C. (*Gaudette* vs *Laliberté*, C. S., Arthabaska, 1er septembre 1869, POLETTE, J., 1 R. L., p. 747, et 20 R. J. R. Q., p. 481)
" DES JUGEMENTS DANS LES CAUSES DE LA COUR DE CIRCUIT APPELABLES. L'article 1081 C. P. C., avant qu'il fut amendé par l'article 6000 S. R. Q., ne s'appliquait qu'aux causes de la Cour de Circuit susceptibles d'appel quant à l'élection de domicile par l'huissier saisissant pour le poursuivant. (*Légaré* vs *Déroches*, et *Déroches*, opposant, C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 51, et 20 R. J. R. Q., p. 294)
EXPERTISE. La cour peut adopter un rapport d'expert et baser son jugement sur ce rapport, quoiqu'aucune des parties dans la cause

n'en ait demandé l'homologation. Un rapport d'expert n'est pas nul parce que tous les experts n'auraient pas donné avis aux parties du jour où ils procèderaient, et qu'un seul des experts ait donné cet avis. (*La Fabrique de Sainte-Julie de Somerset* et *Paquet*, C. B. R. en appel, Québec, 20 juin 1869, DUVAL, J., CARON, J., MONK, J., et MACKAY, J., confirmant le jugement de C. S., STUART, J., 1 R. L., p. 430, et 20 R. J. R. Q., p. 353)

EXPROPRIATION :—*Vide* CORPORATION MUNICIPALE.

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FABRIQUE :—*Vide* LOUAGE DE SERVICE.

FAILLITE. Le droit, sous le § 12 de la sec. 3 de l'acte de faillite de 1864, Statuts du Canada de 1864, 27-28 Vic., ch. 17, de présenter une requête au juge dans les cinq jours qui suivent le rapport du bref de saisie en liquidation forcée, pour demander l'annulation de la saisie faite en vertu de tel bref, sur le principe que ses biens ne sont pas assujettis à la liquidation forcée, est personnel au débiteur, et le cessionnaire des biens de ce débiteur, en vertu d'une cession volontaire faite après la saisie de ses biens en conformité du bref de saisie en liquidation forcée, n'a pas le droit de présenter une telle requête. (*Watson* et *The city of Glasgow Bank*, C. B. R. en appel, Montréal, 8 septembre 1870, DUVAL J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., confirmant le jugement de C. S. R., Montréal, qui confirmait le jugement de C. S., Montréal, MACKAY, J., 14 J., p. 309, et 20 R. J. R. Q., p. 267)

" :—*Vide* ACTE DE FAILLITE DE 1869.

" :— " DISTRIBUTION DES DENIERS D'UN INSOLVABLE A L'ÉTRANGER.

" :— " OBLIGATION.

" :— " VENTE D'IMMEUBLE PAR UN SYNDIC A BANQUEROUTE.

FÉLONIE :—*Vide* RÉCUSATION DES JURÉS.

FEMME COMMUNE EN BIENS :—*Vide* FEMME MARIÉE.

" " " " :— " RESPONSABILITÉ.

" MARIEE. Aux termes de la sec. 36 de l'Ordonnance de 1841, 4 Vict., ch. 30, la femme mariée ne peut s'obliger avec son mari que comme commune en biens, et nul est le cautionnement donné à un tiers, pendant la communauté, par la femme conjointement avec son mari, lorsque depuis est intervenue sentence judiciaire en séparation de biens et que la femme a renoncé à la communauté. (*Jodoin* et *Dufresne et ux.*, C. B. R. en appel, Montréal, 12 mars 1853, confirmant le jugement de C. S., 12 octobre 1852, 3 D. T. B. C., p. 189 ; 3 R. J. R. Q., p. 480, et 20 R. J. R. Q., p. 141)

" MARIEE. Deux obligations notariées signées par une femme séparée de biens avec l'autorisation de son mari et dans lesquelles elle se reconnaît débitrice des sommes mentionnées dans ces contrats, tandis qu'en réalité c'est le mari qui les doit, sont nulles et ne sortent aucun effet par le motif qu'elles ont été passées en contravention avec les dispositions de la sec. 36 de l'Ordonnance de 1841, 4 Vict., ch. 30, la femme mariée ne pouvant s'obliger avec son mari que comme commune en biens. (*Mercille* et *Fournier et vir*, C. B. R. en appel, Montréal, 7 juin 1859, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J., dissident, MEREDITH, J., confirmant le jugement de C. S., Montréal, 30 avril 1858, SMITH, J., 9 D. T. B. C., p. 300 ; 2 J., p. 205 ; 4 J., p. 51 ; 7 R. J. R. Q., pp. 7 et 9, et 20 R. J. R. Q., p. 141)

FEMME MARIEE. L'Ordonnance de 1841, 4 Vict., ch. 30, en voulant protéger les acquéreurs de biens-fonds, a pourvu aux moyens de les garantir contre les réclamations des femmes. Presque tous les droits de ces dernières peuvent être mis à néant; la seule protection qui leur est accordée est celle qui résulte de la 36e clause de l'Ordonnance, laquelle défend à toute femme mariée de se porter caution ou d'encourir aucune responsabilité, si ce n'est comme commune en biens, pour les dettes, engagements ou obligations que son mari pourrait avoir contractés avant leur mariage ou pendant la durée de leur mariage. Cette loi est une loi d'ordre public. Toute tentative de l'éluder est une fraude et la preuve testimoniale est admissible pour l'établir; autrement il serait inutile pour le législateur de faire de semblables lois, s'il suffisait, pour les éluder, que la fraude fut couverte par un acte notarié. Le fait de permettre la preuve testimoniale pour établir qu'un acte est complètement nul à raison de l'illégalité de la matière sur laquelle il stipule, ne semble pas violer la règle générale du droit anglais, qui veut que la preuve testimoniale soit inadmissible pour contredire ou changer les termes d'un écrit valide, car, d'après ce même droit, la preuve testimoniale peut être permise pour démontrer que le contrat dont on se plaint a été fait pour l'avancement d'affaires prohibées par la loi. (*Mercille* et *Fournier et vir*, C. B. R. en appel, Montréal, 7 juin 1869, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J., dissident, MEREDITH, J., confirmant le jugement de C. S., Montréal, 30 avril 1858, SMITH, J., 9 D. T. B. C., p. 300; 2 J., p. 205; 4 J., p. 51; 7 R. J. R. Q., pp. 7 et 9, et 20 R. J. R. Q., p. 141)

" MARIEE. Aux termes de la sec. 36 de l'Ordonnance de 1841, 4 Vict., ch. 30, nulle et de nul effet est l'obligation de garantie de la part de la femme mariée, stipulée dans une vente, consentie à un tiers par cette femme et son mari, d'un bien de la communauté alors existante entre eux à laquelle elle a depuis renoncé après séparation de biens obtenue par sentence judiciaire. Art. 1301 C. C. (*Pinsonneault* vs *Brosseau*, et *Sainte-Marie*, oppte, Cour d'Appel, Montréal, 11 janvier 1847, ROLLAND, J., DAY, J., 3 Rev. de Lég., p. 134; 13 R. J. R. Q., p. 505, et 20 R. J. R. Q., p. 140)

" MARIEE. L'obligation consentie par la femme mariée commune en biens, conjointement avec son mari, avec hypothèque sur l'immeuble de la femme, est nulle aux termes de la sec. 36 de l'Ordonnance de 1841, 4 Vict., ch. 30, s'il y a eu depuis séparation de biens par sentence judiciaire et exécution du jugement prononçant la séparation. Art. 1301 C. C. (*Byrnes* vs *Trudeau et ux.*, C. S., Montréal, 30 novembre 1863, BERTHELOT, J., 14 D. T. B. C., p. 17; 12 R. J. R. Q., p. 232, et 20 R. J. R. Q., p. 140)

" MARIEE. La femme commune en biens peut, pendant la communauté, avec l'autorisation de son mari, ratifier la vente d'un immeuble conquêt de la communauté faite par le mari, et cette ratification constitue une renonciation à l'hypothèque qu'elle a sur cet immeuble pour ses reprises. En faisant une telle ratification, la femme ne se porte pas cependant caution et n'encourt aucune responsabilité pour les dettes, engagements ou obligations contractés par son mari; et la renonciation qui s'ensuit ne viole aucunement les dispositions de l'Ordonnance de 1841, 4 Vict., ch. 30, qui décrétait sec. 36: " Nulle femme mariée ne pourra se porter caution ni encourir de responsabilité en aucune autre qualité que comme commune en biens avec son mari, pour les

dettes, obligations ou engagements contractés par le mari avant le mariage, ou pendant la durée de leur mariage, et tous engagements et obligations contractés par une femme mariée, en violation de cette disposition, seront absolument nuls et de nul effet." Si la femme en ratifiant la vente, s'est obligée à la garantie de la vente conjointement et solidairement avec son mari, cette ratification est valide comme renonciation à ses reprises, mais l'obligation de garantie est nulle comme contraire aux dispositions de ladite ordonnance. (*Boudria et vir* et *McLean*, C. B. R., Montréal, 4 mars 1862, LAFONTAINE, J. en C., AYLWIN, J., dissident, DUVAL, J., MEREDITH, J., et C. MONDELET, J., dissident, confirmant le jugement de C. S., Trois-Rivières, 7 février 1861, POLETTE, J., 12 D. T. B. C., p. 135; 6 J., p. 65 ; 10 R. J. R. Q., p. 24, et 20 R. J. R. Q., p. 140)

FEMME MARIÉE. La vente faite par la femme mariée, commune en biens avec son mari, et sous l'autorisation de ce dernier, de son immeuble propre, mais dont les revenus tombent dans la communauté, pour payer partie du prix d'une vente d'effets mobiliers, faite par l'acheteur du propre de la femme au mari de la femme, sous un contrat de louage déguisé, est nulle comme étant une violation de l'article 1301 C. C., et la femme peut, pendant la communauté, faire déclarer cet acte nul et réclamer son immeuble, et elle n'est pas tenue d'attendre la dissolution de la communauté pour se rembourser de la valeur de cet immeuble au cas où elle l'accepterait. (*Bélanger et vir* vs *Brown*, C. S. R., Montréal, 9 juillet 1870, BERTHELOT, J., MACKAY, J., dissident, et BEAUDRY, J., infirmant le jugement de C. S., Montréal, 31 mars 1870, TORRANCE, J. Le juge MACKAY exprima l'opinion que la femme commune en biens peut vendre son propre pour payer les dettes de son mari ou celles de la communauté, et qu'elle ne peut demander la nullité de cette vente pendant la communauté, mais doit attendre après sa dissolution pour se faire rembourser de la valeur de son propre au cas où elle l'accepterait, ou réclamer son immeuble au cas où elle renoncerait. 14 J., pp. 212 et 259, et 20 R. J. R. Q., p. 137)

" MARIÉE. Une obligation consentie par une femme mariée, pour valeur reçue, à une compagnie de prêt, avec hypothèque sur les immeubles de la femme, sera déclarée nulle, s'il est constaté que le prêt a d'abord été sollicité par le mari qui a offert la garantie des propriétés de sa femme, et, si l'obligation n'a été consentie par la femme que pour cacher la fraude à la loi, et si, ensuite, les deniers ont été employés pour les affaires du mari. Art. 1301 C. C. (*La société de construction de Saint-Hyacinthe* vs *Brunelle et vir*, C. S., Saint-Hyacinthe, 10 janvier 1870, SICOTTE, J., 1 R. L., p. 557, et 20 R. J. R. Q., p. 371)

" MARIÉE :—*Vide* FRAUDE.

" SEPARÉE DE BIENS. Une action en recouvrement du prix de marchandises vendues et livrées à une femme mariée séparée de biens doit être rejetée, s'il n'y a preuve que le mari ait autorisé sa femme à en faire l'achat. (*Benjamin et al.* vs *Clarke et vir*, C. C., Montréal, 17 février 1859, SMITH, J., 3 J., p. 121 ; 7 R. J. R. Q., p. 397, et 20 R. J. R. Q., p. 89)

" SEPARÉE DE BIENS. Le mari et la femme, séparés de biens par sentence judiciaire, sont tenus, conjointement et solidairement, au paiement d'épiceries et autres choses nécessaires à la vie qui leur ont été vendues et livrées, quoique ces épiceries et choses aient été achetées par les époux pen-

dant la communauté qui avait d'abord existé entre eux. (*Paquette* vs *Limoges et vir*, C. C., Montréal, 31 octobre 1862, SMITH, J., 7 J., p. 30; 12 R. J. R. Q., p. 2, et 20 R. J. R. Q., p. 89)

FEMME SÉPARÉE DE BIENS. Le mari et la femme séparés de biens sont solidairement tenus au paiement d'épiceries achetées par le mari, lorsqu'elles sont des choses nécessaires à la vie et qu'elles ont été consommées au domicile commun desdits mari et femme. (*Saint-Amand et al.* vs *Bourret et ux.*, C. C., Montréal, 27 février 1863, MONK, J., 7 J., p. 32; 13 D. T. B. C., p. 238; 11 R. J. R. Q., p. 139, et 20 R. J. R. Q., p. 89)

" SÉPARÉE DE BIENS. La femme mariée séparée de biens, qui vit avec son mari, n'est pas obligée de payer de la viande qu'elle a achetée chez un boucher pour les besoins de la famille; c'est le mari seul qui, comme chef de la famille, est tenu. Art. 1317 C. C. (*Rousson* vs *Gauvin et vir*, C. C., Montréal, 29 avril 1868, BERTHELOT, J., 13 J., p. 82; 1 R. L., p. 86; 19 R. J. R. Q., p. 138, et 20 R. J. R. Q., p. 89)

" SÉPARÉE DE BIENS. La femme séparée de biens d'avec son mari est tenue et peut être condamnée conjointement et solidairement avec lui au paiement des articles nécessaires et indispensables à l'existence et à l'entretien de sa famille et qui lui ont été vendus et livrés. (*Robert* vs *Rombert* dit *Saint-Martin et vir*, C. S. R., Montréal, 31 janvier 1870, MONDELET, J., MACKAY, J. et TORRANCE, J., confirmant le jugement de C. S., Montréal, 30 avril 1869, 14 J., p. 162; 2 R. L., p. 188, et 20 R. J. R. Q., p. 89)

" SÉPARÉE DE BIENS:—*Vide* BILLET PROMISSOIRE.

FOLLE ENCHÈRE:—*Vide* VENTE D'IMMEUBLE PAR UN SYNDIC A BANQUEROUTE.

" ENCHÈRE:—*Vide* EXÉCUTION DES IMMEUBLES.

FONDS SOCIAL:—*Vide* BANQUE DE MONTRÉAL.

FORCLUSION. Lorsque le demandeur n'a pas produit, avec l'exploit d'assignation, les preuves littérales invoquées au soutien de sa demande (art. 99 C. P. C.), et ne les a produites que plus tard en en donnant avis à la partie adverse (art. 106 C. P. C.), le forclusion, après cette production et après l'expiration des délais ordinaires pour plaider, ne peut être donnée par le protonotaire et ne peut avoir lieu sans l'ordre du tribunal. Art. 141 C. P. C. (*Tracy* vs *Isaacson et al.*, C. S., Montréal, 20 juin 1870, BEAUDRY, J., 14 J., p. 236, et 20 R. J. R. Q., p. 167)

" :—*Vide* PROCÉDURE.

FOSSE DE LIGNE. L'ouverture d'un fossé de ligne entre deux héritages ne doit être ordonnée que lorsque c'est le meilleur moyen d'égouter ces héritages. Lorsqu'un cours d'eau a été réglé par un procès-verbal pour égouter deux héritages contigus et voisins, comme étant un moyen préférable d'égout à celui d'un fossé de ligne, l'inspecteur de fossés ne pourra ensuite ordonner l'ouverture d'un fossé de ligne en dérogation au procès-verbal. Un fossé de ligne ne doit pas être ouvert s'il est de nature à causer un dommage considérable à l'une des parties. (*Lemire* et *Courchène*, C. B. R. en appel, Montréal, 9 juin 1868, DUVAL, J., CARON, J., DRUMMOND, J., BADGLEY, J., infirmant le jugement de C. S., Sorel, 25 janvier 1868, LORANGER, J., 1 R. L., p. 158, et 20 R. J. R. Q., p. 329)

" DE LIGNE:—*Vide* ACTION NÉGATOIRE.

FRAIS:—*Vide* REVISION.

FRAUDE. Si un particulier achète un fonds de ses deniers, mais que,

pour frustrer ses créanciers, il fasse apparaître sa femme comme acquéreur, cette feinte n'empêchera pas les créanciers d'exercer leurs droits sur le fonds. (*La société de construction de Saint-Hyacinthe* vs *Brunelle et vir*, C. S., Saint-Hyacinte, 10 janvier 1870, SICOTTE, J., 1 R. L., p. 557, et 20 R. J. R. Q., p. 371)

FRAUDE. La sec. 3, § i du ch. 17 du Statut du Canada de 1864, 27-28 Vic., intitulé: "Acte concernant la faillite," décrète qu' "un débiteur est réputé insolvable et que ses biens deviennent sujets à la liquidation forcée s'il a fait un transport ou une cession générale de ses biens au profit de ses créanciers, autrement que de la manière prescrite par cet acte." Il s'ensuit que, si un débiteur fait une cession de ses biens autrement que de la manière prescrite par cet acte, cette cession est nulle vis-à-vis des créanciers de ce débiteur, comme faite en fraude de leurs droits. (*Calvin et al.* vs *Tranchemontagne et al.*, C. S., Montréal, 31 mars 1870, TORRANCE, J., 14 J., p. 210, et 20 R. J. R. J., p. 134)

" :—*Vide* DONATION D'EFFETS MOBILIERS.

" :— " FEMME MARIÉE.

" :— " OBLIGATION.

" :— " TRANSACTION.

" :— " VENTE.

G

GAINS DE SURVIE. La femme convaincue du meurtre de son mari, perd par cette conviction ses gains de survie. (*Gauthier* vs *Joutras*, ès-qualité, C. S., Sorel, 31 mars 1869, LORANGER, J., 1 R. L., p. 473; 2 La Thémis, p. 82, et 20 R. J. R. Q., p. 359)

GARANTIE:—*Vide* CAUTIONNEMENT.

" :—*Vide* RENTE VIAGÈRE.

" DU VENDEUR. Dans notre droit, la garantie légale est suppléée de droit dans la stipulation d'un contrat de vente; mais le droit commun des contrats de vente, qui oblige le vendeur envers l'acheteur à la garantie de la chose vendue, ne concernant qu'un intérêt particulier des acheteurs, il est permis aux parties de déroger à ce droit par des conventions particulières. Ainsi, le vendeur peut stipuler qu'il ne sera garant que de ses faits. L'article 1506 C. C. dit que "la garantie que le vendeur doit à l'acheteur, est ou légale ou conventionnelle." Par l'article 1508, "le vendeur est obligé de droit à garantir l'acheteur de l'éviction de la totalité ou de partie de la chose vendue, à raison de quelque acte du vendeur, ou de quelque droit existant au temps de la vente." Les articles 1507, 1509 et 1510 indiquent comment cette garantie légale peut être diminuée ou exclue. L'article 1507 dit que "la garantie légale est suppléée de droit sans stipulation dans le contrat de vente. Les parties peuvent néanmoins par des conventions particulières ajouter aux obligations de la garantie légale, en diminuer les effets, ou l'exclure entièrement." L'article 1509 dit que "quoiqu'il soit stipulé que le vendeur n'est soumis à aucune garantie, il demeure cependant obligé à la garantie de ses faits personnels. Toute convention contraire est nulle," et l'article 1510 dit que "dans le même cas de stipulation de non-garantie, le vendeur, au cas d'éviction, est tenu à la restitution du prix de la chose vendue, à moins que l'acheteur n'ait connu, lors de la vente, le danger de l'éviction, ou qu'il n'ait acheté à ses risques et périls." Dans le cas d'une vente où le vendeur s'oblige à garantir l'acquéreur contre *toute dette*,

hypothèque ou douaire, le vendeur de l'immeuble doit être considéré comme ayant limité son obligation à la garantie conventionnelle exprimée au contrat, et il n'est pas responsable de l'éviction de cet immeuble par le cessionnaire de la couronne, s'il est déclaré, dans l'acte de vente, que ni lui ni ses auteurs n'avaient obtenu de lettres patentes de la couronne pour ces terrains vendus. L'article 126 C. P. C. qui dit qu' " en matière de garantie formelle, l'acquéreur troublé ou évincé, n'est pas tenu d'assigner immédiatement son garant direct, mais il a droit d'assigner en garantie tout arrière-garant qui peut éventuellement être tenu d'intervenir dans la cause," n'a pas l'effet de donner à celui qui poursuit un arrière-garant plus de droit contre ce dernier que n'a le garant direct aux droits duquel il est de fait subrogé par les dispositions de cet article. Ainsi si l'arrière-garant a limité sa garantie et que le garant direct ne l'ait pas fait, l'acheteur évincé ne pourra exercer un recours contre l'arrière-garant que dans les termes de l'obligation limitée dans la garantie spéciale. Une personne ou une corporation incapable d'acquérir des immeubles dans la province, qui, cependant, en fait l'acquisition, ne peut, si elle est évincée de l'immeuble acquis, exercer son recours contre un arrière-garant ; ce droit de recours contre l'arrière-garant ne pouvant être cédé que dans une vente valide et comme conséquence de cette vente ; et l'arrière-garant ainsi poursuivi par l'acquéreur incapable d'acheter, peut opposer à l'action en garantie la nullité de la vente en vertu de laquelle le défendeur réclame. L'acquéreur évincé ne peut, en vertu de la garantie, réclamer la restitution du prix de l'arrière-garant. Le droit à la restitution du prix est indépendant de la garantie, et il ne peut être réclamé qu'entre les parties immédiates à la vente ; et ce n'est que dans le cas de stipulation de non-garantie que ce droit de l'acquéreur à la restitution du prix existe, comme le dit l'article 1510 qui est dans les termes suivants : " Dans le même cas de stipulation de non-garantie, le vendeur, au cas de l'éviction, est tenu à la restitution du prix de la chose vendue, à moins que l'acheteur n'ait connu, lors de la vente, le danger de l'éviction, ou qu'il n'ait acheté à ses risques et périls." L'article 126 C. P. C. ne s'applique pas à la restitution du prix, il est limité à la garantie. (*The Chaudière Gold Mining Company* et *Desbarats et al.*, Conseil Privé, 29 juillet 1873, confirmant le jugement de C. B. R. en appel, Montréal, 10 décembre 1870, DUVAL, J. en C. (*dissident*), CARON, J., BADGLEY, J., MONK, J., et LORANGER, J. *ad hoc* (*dissident*), qui confirmait le jugement de C. S., Montréal, 31 mai 1869, TORRANCE, J., 1 R. L., p. 82 ; 13 J., p. 182 ; 15 J., p. 44 ; 2 R. L., p. 623 ; 4 R. L., p. 645 ; 17 J., p. 275 ; 1 R. C., p. 120 ; 5 Law R. P. C., p. 277 ; 19 R. J. R. Q., p. 244, et 20 R. J. R Q., p. 300)

GARDIEN JUDICIAIRE :— *Vide* CONTRAINTE PAR CORPS.

" D'OFFICE. Le gardien d'office nommé par un huissier qui pratique une saisie mobilière, a un recours personnel contre l'huissier pour ses honoraires comme gardien. La cour, sur une poursuite du gardien contre l'huissier, peut déterminer le quantum de ses honoraires, sans égard à la taxe qui en aurait été faite par le greffier de la cour d'où le bref d'exécution serait émané. Art. 560 et 568 C. P. C. (*Courchêne* vs *Généreux*, C. C., Sorel, 16 juin 1865, LORANGER, J., 1 R. L., p. 433, et 20 R. J. R. Q., p. 355)

GRAND TRONC DE CHEMIN DE FER DU CANADA :—*Vide* MAIN-MORTE.

" TRONC DE CHEMIN DE FER DU CANADA :—*Vide* VENTE.

H

HYPOTHÈQUE :—*Vide* DÉTENTEUR DE TERRE HYPOTHÉQUÉE.
" :— " ENREGISTREMENT.
" :— " FEMME MARIÉE.

I

IMPUTATION :—*Vide* LETTRE DE GARANTIE.
INSOLVABILITE :—*Vide* ACTE DE FAILLITE.
INSOLVABLE :—*Vide* DISTRIBUTION DES DENIERS D'UN INSOLVABLE A L'ÉTRANGER.
INSPECTEUR DE CLOTURES ET FOSSÉS :—*Vide* PREUVE.
" DES FOSSES :—*Vide* ACTION NÉGATOIRE.
INTÉRÊT :—*Vide* DÉPOT.
" :— " ENREGISTREMENT.
" :— " TESTAMENT.
INTERPRETATION DES CONTRATS :—*Vide* RENTE VIAGÈRE.
INTERVENTION :—*Vide* FAILLITE.

J

JUGE DE PAIX. Règle générale, les juges de paix doivent adjuger sur les exceptions qui attaquent leur juridiction ou qui réclament des exemptions, afin de permettre aux cours supérieures d'apprécier la justice de ces exceptions. (*Dubord* vs *Boivin*, C. S., Saint-Hyacinthe, 22 novembre 1866, SICOTTE, J., 14 J., p. 203, et 20 R. J. R. Q., p. 126)
" DE PAIX. Une conviction prononcée par des juges de paix doit contenir l'adjudication sur le fait qui constitue la base de la conviction ; et l'énonciation, dans une conviction pour amende, prononcée sous les dispositions de l'acte de tempérance de 1864, 27-28 Vic., ch 18, sec. 14, " qu'il résulte pleinement de la preuve que le défendeur a vendu sans licence des liqueurs spiritueuses," n'est pas une adjudication suffisante, et il pourra être ordonné par prohibition aux juges de paix de ne pas exécuter une telle conviction. (*Dubord* vs *Boivin*, C. S., Saint-Hyacinthe, 22 novembre 1866, SICOTTE, J., 14 J., p. 203, et 20 R. J. R. Q., p. 126)
" DE PAIX :—*Vide* ACTE DE TEMPÉRANCE DE 1864.
" " " :— " CERTIORARI.
" " " :— " JURIDICTION.
" " " :— " LICENCE D'AUBERGE.
" " " :— " PROHIBITION.
" " " :— " RÈGLEMENT MUNICIPAL.
JUGEMENT :—*Vide* PROCÉDURE.
" :—*Vide* SAISIE-ARRÊT APRÈS JUGEMENT.
JURE :—*Vide* PROCÉDURE EN MATIÈRE CRIMINELLE.
" EN MATIERE CIVILE :—Un juré spécial, assigné pour servir dans une cause civile, et qui est déchargé avant de servir, n'a droit à aucune rémunération comme tel, la loi n'ayant pourvu qu'au paiement des douze jurés qui servent au procès. (*Sylvestre* vs *Manseau*, C. C., Sorel, 8 janvier 1870, LORANGER, J., 2 R. L., p. 93, et 20 R. J. R. Q., p. 499)
JURIDICTION. Les attributions des juges et leurs pouvoirs ne peuvent s'atténuer et se distribuer par des acquiescements tacites, elles sont de droit public et les juges n'ont d'action, d'initiative, que dans les modalités prescrites par la loi. (*Dubord*

vs *Boivin*, C. S., Saint-Hyacinthe, 22 novembre 1866, SICOTTE, J., 14 J., p. 203, et 20 R. J. R. Q., p. 126)
JURIDICTION :—*Vide* COMPÉTENCE.

L

LEGATAIRE :—*Vide* TESTAMENT.
LEGS. Lorsqu'un legs est fait en ces termes : "Je donne et lègue à mon pupille, W.H., $500 pour être employées à terminer son éducation," et que l'éducation du légataire a été terminée aux frais du testateur, avant le décès de ce dernier, le légataire n'en a pas moins droit de réclamer le montant de son legs. (*Hervey*, ès-qualité, et *Hervey*, C. B. R. en appel, Montréal, 7 septembre 1870, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et LORANGER, J. *ad hoc*, confirmant le jugement de C. S. R., Montréal, 31 mars 1869, MONDELET, J., dissident, TORRANCE, J., et BEAUDRY, J. A., qui confirmait le jugement de C. S., Montréal, 9 juillet 1868, MONK, J., 14 J., p. 290, et 20 R. J. R. Q., p. 227)
" Un legs fait dans les termes suivants : "Je lègue à ma sœur deux mille piastres d'actions dans la banque de Montréal, mais je veux que l'intérêt ou les dividendes qui s'accroîtront ou seront payés sur lesdites deux mille piastres d'actions ainsi léguées à ma sœur soient payés par mes exécuteurs à mon mari tant qu'il vivra, et que le capital desdites deux mille piastres ainsi léguées à ma sœur, ne sera payable et transférable à ma sœur ou à ses héritiers ou légataires qu'après le décès de mon mari. Mais, lors du décès de mon mari, le capital desdites deux mille piastres d'actions ainsi léguées à ma sœur, sera immédiatement payable et transférable à quiconque elle pourra l'avoir légué, et, jusqu'au décès de mon mari, ces deux mille piastres resteront sous le contrôle de mes exécuteurs testamentaires," transfère de suite, au décès de la testatrice, la propriété de ces actions à la sœur de la testatrice, et ces actions passent dans le legs universel ensuite fait par la légataire en vertu de son testament, et ce legs ne transfère pas seulement à la légataire le droit d'en disposer spécialement par un legs. (*La Banque de Montréal* et *Henderson et al.*, C. B. R. en appel, Montréal, 4 mars 1870, DRUMMOND, J., BADGLEY, J., MONK, J., et POLETTE, J. *ad hoc*, 14 J., p. 169, et 20 R.J.R.Q., p. 98)
" :—*Vide* TESTAMENT.
LETTRE DE GARANTIE. Un cautionnement, par lettre de garantie, pour des avances à faire à un marchand par une maison de commerce, cesse d'avoir effet du jour d'un changement dans la société qui fait les avances, parce qu'un membre de la société se retire, quand même ce membre consentirait à figurer dans la raison sociale de la nouvelle société. Les reçus donnés aux débiteurs, après cette époque, au nom de l'ancienne raison sociale qui est celle de la nouvelle société, comme elle était celle de l'ancienne, ne doivent pas s'imputer sur les avances faites par la nouvelle société, mais sur celles garanties par le cautionnement, et le signataire de la lettre de garantie qui, dans l'ignorance des faits, aurait signé un billet pour la balance du compte de celui pour qui la lettre a été donnée, pourra faire déclarer ce billet donné par erreur et se faire décharger de son obligation. (*Hénault* et *Huno et al.*, C. B. R. en appel, Montréal, 9 juin 1868, DUVAL, J. en C., dissident, AYLWIN, J., CARON, J., dissident, BADGLEY, J. et DRUMMOND, J., 1 R. L., p. 706, et 20 R. J. R. Q., p. 464)

LETTRE DE GARANTIE :—*Vide* CAUTIONNEMENT.
LESION :—*Vide* MINORITÉ.
LICENCE :—*Vide* CERTIORARI.
" D'AUBERGE. L'écrit suivant: "Reçu de M. Dubord trente-quatre piastres pour payer une licence d'auberge pour laquelle il a obtenu le certificat du conseil du comté de Bagot en date de ce jour. Saint-Hyacinthe, 13 juin 1866, Léonard Boivin, percepteur du revenu de l'Intérieur," doit protéger le défendeur et l'exempter de l'amende sur une poursuite pour vente de boisson sans licence, et si, malgré ce reçu produit par le défendeur poursuivi pour amende, il est condamné, l'exécution de la conviction pourra être arrêtée par bref de prohibition. (*Dubord* vs *Boivin*, C. S., Saint-Hyacinthe, 22 novembre 1866, SICOTTE, J., 14 J., p. 203, et 20 R. J. R. Q., p. 126)
LIQUIDATION FORCEE :—*Vide* ACTE DE FAILLITE de 1869.
" FORCEE SOUS L'ACTE DE FAILLITE DE 1864. La sec. 3, § *i*, du ch. 17 des S. du C. de 1864, 27-28 Vict., intitulé: "Acte concernant la faillite," décrétait qu'un débiteur était réputé insolvable et ses biens devenaient sujets à la liquidation forcée, s'il avait fait un transport ou une cession générale de ses biens au profit de ses créanciers autrement que de la manière prescrite par cet acte. Il a été jugé que le syndic à la faillite d'un créancier qui a consenti à une cession volontaire des biens de son débiteur autrement que sous les dispositions de l'acte de faillite de 1864, et qui a donné une décharge à son débiteur, ne peut faire émettre un bref de liquidation forcée sous les dispositions de l'acte de faillite, vu que le créancier, ayant approuvé la cession et donné une décharge au débiteur, n'est plus un créancier, et que le syndic de ce dernier n'a pas plus de droit qu'il n'en avait lui-même. (*Whyte* vs *Cohen*, C. S., Montréal, 21 avril 1869, MONDELET, J., 14 J., p. 83, et 20 R. J. R. Q., p. 28)
LOCATAIRE :—*Vide* CAPIAS.
LOCATEURS ET LOCATAIRES :—*Vide* COMPÉTENCE.
LOUAGE. Une défense au locataire de céder son bail sans le consentement du locateur, n'empêche pas ce locataire de sous-louer une partie seulement des lieux ; ainsi le locataire qui prend à loyer plusieurs étages d'une maison, avec prohibition de céder son bail, peut sous-louer un étage de cette maison, sans enfreindre la condition du bail. Art. 1638 C. C. (*Dorion et al.* vs *Baltzley*, C. S. R., Montréal, 30 septembre 1869, MONDELET, J., MACKAY, J., et TORRANCE, J., confirmant le jugement de C. S., Montréal, 3 juin 1869, MACKAY, J., 14 J., p. 305, et 20 R. J. R. Q., p. 264)
" Le locataire qui fait aux lieux loués des réparations mêmes nécessaires, sans avoir obtenu du tribunal l'autorisation de les faire aux frais du locateur, et même sans avoir mis ce dernier en demeure de les faire, ne pourra rien recouvrer du locateur du coût de ces réparations, Art. 1641 C. C. (*Spelman* vs *Muldoon*, Montréal, 30 novembre 1869, MACKAY, J., 14 J., p. 306, et 20 R. J. R. Q., p. 265)
" Le locataire n'est tenu d'avoir, dans la maison louée, que les meubles suffisants pour répondre d'un terme du loyer (un mois, si le loyer est payable au mois), et les frais d'une action en expulsion. Art. 1624 C. C. (*Gareau* vs *Paquet*, C. C., Montréal, 16 août 1870, BEAUDRY, J., 14 J, p. 266 ; 2 La Thémis, p. 27, et 20 R. J. R. Q., p. 195)
" :—*Vide* COMPÉTENCE.
" DE SERVICES. Lorsqu'un chantre dans une église se conduit d'une manière insolante et inconvenante vis-à-vis du curé

de la paroisse, il peut être expulsé par le curé et renvoyé comme chantre, et, dans ce cas, la fabrique n'est tenue de lui payer son salaire que jusqu'au temps du renvoi. (*Boudreault* vs *Les Curé et Marguilliers de l'œuvre et fabrique de la paroisse de la Visitation du Sault-au-Récollet*, C. C., Montréal, 30 octobre 1869, BERTHELOT, J., 1 R. L., p. 663, et 20 R. J. R. Q., p. 419)

LOUAGE DE SERVICES:—*Vide* MÉDECIN.

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MAINMORTE. La Bourse de Québec, compagnie à fonds social incorporée par le statut du Bas-Canada de 1830, 10 et 11 Geo. 4, ch. 15, intitulé: "Acte pour incorporer la Bourse de Québec," n'est pas une mainmorte, et l'acquisition d'un immeuble faite par cette corporation ne donne pas lieu au droit d'indemnité ou d'amortissement en faveur du seigneur, cette corporation n'étant pas perpétuelle et n'étant pas frappée de l'incapacité d'aliéner et différant essentiellement à cet égard de la mainmorte. (*Séminaire de Québec* vs *Bourse de Québec*, C. S., 21 février 1853, BOWEN, J. en C., et DUVAL, J., 3 D. T. B. C., p. 76)

" La Compagnie du Grand-Tronc de chemin de fer du Canada, telle que constituée par le ch. 33 des Statuts du Canada de 1854, 18 Vict., est un ouvrage d'utilité publique et n'est pas, en loi, une corporation de mainmorte sujette au paiement de l'indemnité seigneuriale pour les acquisitions d'immeubles par elle faites pour ses fins, et les terrains possédés par cette compagnie ne sont pas des terrains tenus en mainmorte. Même, si la Compagnie du Grand-Tronc de chemin de fer du Canada devait être considérée comme une compagnie de mainmorte, elle ne serait pas tenue de payer au seigneur une indemnité au sujet de la cession ou vente par la Compagnie de chemin de fer du Saint-Laurent et de l'Atlantique, vu que cette dernière compagnie avait déjà payé une indemnité au seigneur pour les terrains acquis par elle et cédés à la Compagnie du Grand-Tronc de chemin de fer du Canada, cette dernière étant soustraite à cette obligation par la sec. 34 du ch. 3 des Statuts du Canada de 1854, 18 Vict., intitulé: "Acte pour l'abolition des droits et devoirs féodaux dans le Bas-Canada," laquelle se lit ainsi qu'il suit: "Tous fonds sur lesquels des droits d'indemnité ont été payés à un seigneur, et qui n'ont pas été vendus ou concédés depuis tel paiement à des personnes possédant autrement qu'en mainmorte, sont par le présent déclarés être, et avoir été du jour de la date de tel paiement ou de tout acte ou contrat par écrit obligeant tel propriétaire à payer tels droits, déchargés de toutes redevances et charges seigneuriales, et tenus en franc-aleu roturier, mais sujets au paiement d'une rente constituée, égale aux cens et rente légalement dus sur iceux. (*Kierskowski* et *Cie du Grand-Tronc de chemin de fer du Canada*, C. B. R. en appel, Montréal, 9 décembre 1859, LAFONTAINE, J. en C. (*dissident*), AYLWIN, J., DUVAL, J., MEREDITH, J. (*dissident*), et A. LAFONTAINE, J., confirmant le jugement de C. S., Montréal, 30 novembre 1857, SMITH, J. (*dissident*)), MONDELET, J., et BADGLEY, J., 4 J., p. 86; 8 D. T. B. C., p. 3; 10 D. T. B. C., p. 47; 6 R. J. R. Q., pp. 93 et 124, et 8 R. J. R. Q., p. 492). Le juge en chef LAFONTAINE exprima l'opinion que la compagnie du Grand-Tronc de chemin de fer du Canada, ayant succession perpétuelle et ayant le droit d'acquérir des immeubles pour les

fins de son chemin, devait être considérée comme une corporation de mainmorte; la déclaration de Louis XV enregistrée au Conseil Supérieur, à Québec, reconnaissant ce caractère de mainmorte non seulement à des corps et communautés ecclésiastiques, mais encore à des corps et communautés laïques, et il s'appuya sur la sec. 13 du ch. 48 des Statuts du Canada de 1859, intitulé : " L'acte d'amendement seigneurial de 1859," pour soutenir que les corporations devaient être considérées comme gens de mainmorte. Cette section se lit comme suit : " Tout immeuble tenu en mainmorte, ou par une corporation, dans les parties desdites seigneuries qui se trouvent dans la cité et la paroisse de Montréal comme il est dit plus haut, et dont la tenure n'est pas déjà commuée, sera commué dans le cours des vingt années qui suivront la passation du présent acte, et s'il n'est commué volontairement, le droit de commutation sur icelui, calculé et constaté en la manière prescrite par ladite Ordonnance et sous les dispositions du pr´sent acte, deviendra dû audit séminaire et sera garanti sous les mêmes privilèges que le droit de commutation mentionné dans la section précédente." Le juge en chef exprima aussi l'opinion que la s. 34 du ch. 3 des Statuts du Canada de 1854, qui a été sanctionné le 18 décembre 1854, n'avait pas d'effet rétroactif et ne s'appliquait pas à la convention du 12 avril 1853. Le juge MEREDITH exprima l'opinion que, dans le droit anglais, ainsi que dans le droit français, les gens de mainmorte sont tous les corps et communautés tant ecclésiastiques que laïques qui sont perpétuels, et qui, par une subrogation de personnes, étant censés toujours les mêmes, ne produisent aucune mutation par mort, et que tout titre qui transfère l'immeuble à un propriétaire qui ne peut point aliéner, ou qui ne meurt point, donne ouverture au droit d'indemnité.

MAINMORTE :—*Vide* CORPORATION COMMERCIALE ÉTRANGÈRE.

MAITRE DE VAISSEAU :—SAISIE REVENDICATION.

MANDAMUS. Lorsqu'une corporation néglige de faire un acte au temps fixé par la loi, le tribunal pourra, sur *mandamus*, lui ordonner de faire cet acte à une autre époque. Pour forcer les membres du bureau d'examinateurs du barreau à faire l'examen d'un candidat à la pratique du droit, il n'est pas nécessaire de poursuivre la corporation, il suffit de poursuivre les membres du comité qui sont chargés de faire l'examen. Un bref de *mandamus* doit être adressé individuellement aux membres du bureau de direction d'une corporation ou aux officiers qui doivent accomplir pour la corporation, l'acte requis, de manière à les contraindre personnellement à accomplir le devoir demandé, et à rendre sujets à l'emprisonnement ceux d'entre eux qui refuseraient l'obéissance au bref péremptoire de *mandamus*. Dans le cas d'un *mandamus* dirigé contre plusieurs membres d'une corporation, les défendeurs peuvent plaider séparément et ils ne sont pas tenus de faire la même défense. (*Bureau* vs *Genest et al.*, C. S., Trois-Rivières, 15 juillet 1869, POLETTE, J., 1 R. L., p. 674, et 20 R. J. R. Q., p. 426)

" Un officier ou employé public qui agit pour exécuter les ordres de son supérieur, ne peut être contraint par *mandamus* à accomplir un acte sur lequel il n'a aucun contrôle et dont l'exécution est entièrement à la discrétion de son supérieur. Ainsi, un agent des bois de la couronne ne peut être contraint par *mandamus* à accorder des permis de coupe de bois sur les terres non concedées de la province. La sec. 1 du

ch. 23 des S. R. C. de 1859, intitulé: " Acte concernant la vente et l'administration des bois sur les terres publiques, décrétant que " le commissaire des terres de la couronne, ou tout officier ou agent sous ses ordres et dûment autorisé à cet effet, pourra accorder des permis de coupe de bois sur les terres non concédées de la province, aux taux et conditions, et d'après les règlements et restrictions qui pourront être établis de temps à autre par le gouverneur en conseil. (*Gouin* vs *Dubord*, C. S., Trois-Rivières, 30 avril 1870, POLETTE, J., 2 R. L., p. 49; 1 R. C., p. 248, et 20 R. J. R. Q., p. 492)

MANDAMUS. Lorsque la loi décrète qu'un officier public pourra faire une chose, ce devoir n'est pas impératif, mais il est facultatif (S. R. B. C. de 1861, ch. 1, sec. 13, § 3). Ainsi, la section 1 du ch. 23 des S. R. C. de 1859, intitulé: "Acte concernant la vente et l'administration des bois sur les terres publiques," qui décrète que " le commissaire des terres de la couronne, ou tout officier ou agent sous ses ordres et dûment autorisé à cet effet, pourra accorder des permis de coupe de bois sur les terres non concédées de la province, aux taux et conditions, et d'après les règlements et restrictions qui pourront être établis de temps à autre par le gouverneur en conseil," n'oblige pas le commissaire ou un agent, sous ses ordres, à accorder des permis de coupe de bois, mais lui donne le pouvoir facultatif de le faire, et un *mandamus* ne pourra émaner pour le forcer à délivrer des permis de coupe de bois. Lorsqu'un officier public a un pouvoir discrétionnaire à exercer, il peut être contraint à l'exercer, mais il ne peut être forcé de l'exercer dans un sens plutôt que dans l'autre. (*Gouin* vs *Dubord*, C. S., Trois-Rivières, 30 avril 1870, POLETTE, J., 2 R. L., p. 49; 1 R. C., p. 248, et 20 R. J. R. Q., p. 492)

MANDAT:—*Vide* ASSURANCE CONTRE L'INCENDIE.
" :— " CESSION DE BIENS VOLONTAIRE.
" :— " CORPORATION MUNICIPALE,
" :— " TRANSACTION.
" :— " VENTE.

MARIAGE:—*Vide* FEMME SÉPARÉE DE BIENS.

MEDECIN. Par l'article 2260, § 7, C. C., le médecin a droit d'offrir son serment pour établir la nature et la durée des services rendus durant l'année de la poursuite, mais ce serment n'établit pas la valeur de ses services, et il faut établir cette valeur, comme dans tous les autres cas. La réclamation d'un médecin pour services professionnels, doit se taxer sur la valeur réelle des services rendus, et la prétention de l'élever suivant la fortune du patient est immorale. (*Boucher et al.* et *Duhault*, C. B. R. en appel, Montréal, 9 juin 1868, DUVAL, J., AYLWIN, J., CARON, J., BADGLEY, J., DRUMMOND, J., 1 R. L., p. 702, et 20 R. J. R. Q., p. 462)
" :—*Vide* PRESCRIPTION.
" :— " PREUVE

MEMOIRE DE FRAIS:—*Vide* DÉPENS.

MEPRIS DE COUR:—*Vide* CONTRAINTE PAR CORPS.

MEURTRE:—*Vide* CAPACITÉ DE CONTRACTER D'UNE PERSONNE ACCUSÉE DE MEURTRE.
" :—*Vide* COMMUNAUTÉ DE BIENS.
" :— " TESTAMENT.

MINORITE. Un défendeur qui est poursuivi sur un billet promissoire qu'il a consenti pendant sa minorité, ne peut faire renvoyer la poursuite en plaidant le seul fait qu'il était mineur lorsqu'il a consenti ce billet, mais, pour réussir, il doit encore

demander par sa défense à être relevé de l'obligation qu'il a contractée pendant sa minorité, en alléguant qu'il a été lésé et de quelle manière il l'a été. Art. 1011 C. C. (*Cartier* vs *Peltier*, C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 46, et 20 R. J. R. Q., p. 290)

MISE A L'ECART :—*Vide* PROCÉDURE EN MATIÈRE CRIMINELLE.

MOTION :—*Vide* DÉSISTEMENT.

" :— " PROCÉDURE.

N

NOTAIRE :—*Vide* ACTE AUTHENTIQUE.

" :— " DONATION ENTRE-VIFS.

NOUVEAU PROCES :—*Vide* ASSURANCE CONTRE L'INCENDIE.

NULLITE :—*Vide* DÉCRET.

" :— " FEMME MARIÉE.

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OBLIGATION. Le § 13 de la sec. 9 du ch. 17 des S. C. de 1864, 27-28 Vic., intitulé: "Acte concernant la faillite," est en ces termes: "Toute décharge ou composition ou toute ratification d'une décharge ou composition, obtenue par fraude ou au moyen de préférences frauduleuses, ou au moyen du consentement d'un créancier, obtenu par le paiement à tel créancier d'une valeur quelconque sera nulle et de nulle effet." La sec. 28 du ch. 18 des S. C. de 1865, 29 Vic., intitulé: "Acte pour amender l'Acte concernant la Faillite, 1864," se lit comme suit: "Si le créancier d'un failli prend ou reçoit directement ou indirectement du failli aucun paiement, don, gratification ou privilège, ou aucune promesse de paiement, don, gratification ou privilège, comme considération ou engagement pour le faire consentir à sa décharge ou pour lui faire exécuter un acte de composition et de décharge en sa faveur—tel créancier encourra une amende égale à trois fois la valeur du paiement, don, gratification ou privilège, ainsi pris, reçu ou promis—laquelle pourra être recouvrer par le syndic au bénéfice de la masse par action devant toute cour compétente, et après recouvrement sera distribuée comme formant partie de l'actif ordinaire des biens." Jugé, sous ces dispositions, que le billet d'un tiers remis par l'un des membres d'une société commerciale en faillite, à l'un des créanciers de cette société pour le montant de la balance de la créance de ce créancier contre la société, pour l'induire à consentir à la décharge des membres de cette société, est nul, et que ce créancier ne peut en recouvrer le montant contre le tiers signataire du billet. (*Prévost et al.* et *Pickel*, C. B. R. en appel, Montréal, 18 mars 1872, CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., confirmant le jugement de C. S., Montréal, 18 juin 1870, MACKAY, J. La Cour d'Appel s'est appuyée pour déclarer ce billet nul sur les dispositions sus-mentionnées de l'acte de faillite et de son amendement, tandis que la cour de première instance, MACKAY, J., a déclaré que ce billet était nul sous les dispositions du droit commun et les dispositions susdites des actes de faillite. 14 J., p. 220; 17 J., p. 314; 2 R. C., p. 231; 14 R. L., p. 204, et 20 R. J. R. Q., p. 148)

" DE DONNER :—*Vide* RENTE VIAGÈRE.

OFFICIER PUBLIC :—*Vide* DÉPÔT.

" " :— " MANDAMUS.

OFFRE LEGALE:—*Vide* PAIEMENT.
OPPOSITION:—*Vide* CAUTIONNEMENT POUR FRAIS.
" A FIN D'ANNULER. Le défendeur qui est saisi pour plus qu'il ne doit, en vertu du jugement qui le condamne et dont il a payé une partie depuis, a droit de s'opposer à cette saisie et de demander que la vente n'ait lieu que pour la balance qu'il doit. Arts 581 et 653 C. P. C. (*Lafleur* vs *Verville*, et *Verville*, oppt, C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 45, et 20 R. J. R. Q., p. 289)
" A FIN D'ANNULER. Une personne sur laquelle un immeuble a été vendu par le shérif, ne peut, *de plano*, s'opposer à la saisie du même immeuble sur un tiers détenteur d'icelui, en soutenant que la première vente faite sur lui était nulle, sans avoir, au préalable, fait annuler cette première vente ou ce décret dont il demande la nullité par son opposition, et ce, dans la cause où il a eu lieu. (*Armstrong* vs *Barrette*, et *Crébassa*, oppt, C. S. R., Montréal, 31 mai 1870, MACKAY, J., TORRANCE, J., et BEAUDRY, J., 2 R. L., p. 98, et 20 R. J. R. Q., p. 413)
" A FIN DE DISTRAIRE. Lorsqu'une opposition à fin de distraire est faite par un tiers à la saisie pratiquée par le demandeur contre les immeubles du défendeur, et que cette opposition est contestée par une partie dans la cause autre que le défendeur, ce dernier a droit d'être notifié de tous les procédés adoptés sur l'opposition; et un jugement final rendu entre le contestant et l'opposant, sans avis au défendeur, sera infirmé en appel, et le dossier sera renvoyé en cour de première instance pour qu'il y soit procédé suivant que de droit entre l'opposant et le défendeur. (*Kelly* et *Le Maire et le Conseil de la ville de Sorel et al.*, C. B. R. en appel, Montréal, 8 juin 1869, DUVAL, J., CARON, J., MONK, J., MACKAY, J., et JOHNSON, J. *ad hoc*, infirmant le jugement de C. S., Sorel, 30 juin 1863, LORANGER, J., 1 R. L., p. 167, et 20 R. J. R. Q., p. 335)
" A FIN DE DISTRAIRE:—*Vide* ENREGISTREMENT DES VAISSEAUX NAVIGUANT A L'INTÉRIEUR.

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PAIEMENT. Le paiement d'un billet promissoire, fait et daté à l'étranger, doit, dans la province de Québec, se faire en monnaie ayant cours dans cette province, et le débiteur, ici, ne peut se faire libérer en offrant de payer ce billet en monnaie légale, mais ayant un cours déprécié dans l'endroit où le billet a été fait et daté. (*Chapman* vs *MacPhee et al.*, C. S. R., Montréal, 30 avril 1869, MONDELET, J., TORRANCE, J., et BEAUDRY, J., infirmant le jugement de C. S., Bedford, 23 octobre 1868, JOHNSON, J., 1 R. L., p. 192, et 20 R. J. R. Q., p. 339)
" :—*Vide* CONFUSION.
PARJURE. Il ne peut pas y avoir de complice en matière de parjure, et l'accusé seul doit être tenu responsable du parjure dont on se plaint. (*Regina* vs *Pelletier et Tellier*, C. B. R., Montréal, 9 mars 1870, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J., 1 R. L., p. 565; 3 R. L., p. 124; 15 J., p. 146, et 20 R. J. R. Q., p. 377)
PAROISSE:—*Vide* LOUAGE DE SERVICES.
PARTIES EN CAUSE:—*Vide* PROCÉDURE.
PENALITE:—*Vide* COMMISSAIRE D'ÉCOLE.
PENSION ALIMENTAIRE:—*Vide* COMPÉTENCE.

PETITS-ENFANTS :—*Vide* SUBSTITUTION.
POSSESSION DE MEUBLES :—*Vide* PREUVE.
PRESCRIPTION. La souscription d'actions dans le capital d'une compagnie de chemin de fer n'est pas une affaire commerciale dans le sens du ch. 67 des S. R. B. C. de 1861, et n'est pas sujette à la prescription de six années à compter de chaque versement demandé sur les actions souscrites. (*Cie de chemin de fer des rivières Connecticut et Passumpsic* et *Comstock*, C. B. R. en appel, Montréal, 8 mars 1870, CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., confirmant le jugement de C. S., Sherbrooke, 8 juillet 1867, SHORT, J., 1 R. L., p. 589, et 20 R. J. R. Q., p. 392)
" Les comptes des médecins antérieurs au code se prescrivaient par cinq ans. (*Valois* vs *Roy*, C. S. R., Montréal, 31 mai 1869, MONDELET, J., BERTHELOT, J., et TORRANCE, J., 1 R. L., p. 199, et 20 R. J. R. Q., p. 343)
" La connaissance que l'acquéreur a d'une créance enregistrée, constituée par son vendeur sur l'immeuble qu'il lui a vendu, ne l'empêche pas de prescrire contre le créancier et le paiement d'un acompte sur cette créance fait par cet acquéreur comme agent du vendeur et avec les deniers de ce vendeur, n'a pas l'effet d'interrompre cette prescription, et, si cet acquéreur est poursuivi pour partie du prix de la vente à lui faite, il ne peut demander caution au sujet de cette créance ainsi prescrite, sous l'article 1535 C. C. (*Kaigle* et *Pierce*, C. B. R. en appel, Montréal, 10 septembre 1870, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et BEAUDRY, J. *ad hoc*, confirmant le jugement de C. S. R., Montréal, 30 mai 1868, BERTHELOT, J., MONDELET, J., dissident, et MONK, J., qui confirmait le jugement de C. C., Iberville, 11 juin 1867, SICOTTE, J., 15 J., p. 227; 1 R. L., p. 697, et 20 R. J. R. Q., p. 438)
" :—*Vide* BORNAGE.
" :— " ENREGISTREMENT.
" :— " VENTE DE PROPRIÉTÉ POUR TAXES MUNICIPALES.
PREUVE. La preuve testimoniale ne peut être reçue pour prouver le paiement d'une dette due en vertu d'un jugement, quand même, à l'origine, la dette serait d'une nature commerciale. La déclaration qu'un témoin fait qu'un reçu constatant le payement de cette créance est perdu, n'est pas suffisante pour faire admettre la preuve testimoniale. Il faut prouver le cas fortuit par lequel ce reçu a été perdu. Art. 1233 C. C. (*Miller* vs *Kemp*, et *Baker et al.*, tiers-saisis, C.S.R., Montréal, 30 décembre 1869, MONDELET, J., BERTHELOT, J., et MACKAY, J., confirmant le jugement de C. S., Montréal, MONK, J., 14 J., p. 74, et 20 R. J. R. Q., p. 18)
" En vertu des dispositions du § 7 de l'article 2260 C. C., tel qu'amendé par la section 1 du ch. 32 des statuts de Québec de 1869, 32 Vict., intitulé : " Acte pour amender l'article 2260 du Code Civil, en ce qui concerne les honoraires dus aux médecins," un médecin a le droit de prouver la nature et la durée de ses soins durant cinq années pour tels soins rendus avant la passation de ce statut, vu qu'en fait de preuve et de procédure, la loi actuelle règle les faits antérieurs. (*Whyte* vs *De Bonald*, C. C., Montréal, 15 octobre 1869, TORRANCE, 14 J., p. 133; 2 R. L., p. 183, et 20 R. J. R. Q., p. 39)
" Le § 21 de la sec 20 du ch. 24 des S. R. B. C. de 1861, intitulé : " Acte concernant les municipalités et les chemins dans le Bas-Canada," était en ces termes : " Toute nomination d'un officier, par un conseil municipal, sera faite par une

résolution adoptée par le conseil, et le secrétaire-trésorier sera tenu d'en donner immédiatement avis spécial à la personne ainsi nommée." Il a été jugé, sous ces dispositions, que la preuve qu'un inspecteur de clôtures et de fossés avait juridiction pour ordonner l'ouverture d'un fossé de ligne, doit se faire par la production de la résolution du conseil le nommant, lorsque sa qualité est spécialement niée dans la cause, et la preuve verbale qu'il est reconnu et qu'il agit comme tel, est insuffisante. (*Lemire* et *Courchêne*, C. B. R. en appel, Montréal, 9 juin 1868, DUVAL, J. en C., CARON, J., DRUMMOND, J., et BADGLEY, J., infirmant le jugement de C. S., Sorel, 25 janvier 1868, LORANGER, J., 1 R. L., p. 158, et 20 R. J. R. Q., p. 329)

PREUVE. Lorsqu'un acte, reçu par un notaire, est rédigé et lu, par ce dernier, dans une langue étrangère à une des parties contractantes et qu'elle ne comprend pas, cette dernière peut prouver par témoins l'erreur et son défaut de consentement aux conventions contenues dans l'acte, et elle n'est pas obligée dans ce cas d'avoir recours à l'inscription de faux pour faire annuler l'acte. (*Noble* vs *Lahaye*, C. S. R., Montréal, 30 avril 1869, MONDELET, J., BERTHELOT, J., et TORRANCE, J., confirmant le jugement de C. S., Saint-François, 2 mai 1868, SHORT, J., 1 R. L., p. 197, et 20 R. J. R. Q., p. 342)

" Le médecin, demandeur dans une cause, ne peut faire preuve de son compte, par son propre serment, sans au préalable en avoir obtenu la permission du tribunal. (*Valois* vs *Roy*, C. S. R., Montréal, 31 mai 1869, MONDELET, J., BERTHELOT, J., et TORRANCE, J., 1 R. L., p. 199, et 20 R. J. R. Q., p. 343)

" La sec. 10 du ch. 2 des Ordonnances de 1785, 25 Geo. III, intitulée: "Ordonnance qui règle les formes de procéder dans les Cours Civiles de Judicature, et qui établit les Procès par Jurés dans les affaires de commerce, et d'injures personnelles qui doivent être compensées en dommages, en la Province de Québec," était en ces termes: "Dans la preuve de tous faits concernant les affaires de commerce, on aura recours dans toutes les Cours de juridiction civile en cette province, aux formes admises, quant aux témoignages par les lois anglaises." La sec. 63 du ch. 5 du statut du Canada de 1858, 22 Vict., intitulé: "Acte pour amender ultérieurement les Actes de judicature du Bas-Canada," se lisait comme suit: "La loi quant à la preuve de tous faits concernant les affaires de commerce en force dans le Bas-Canada, s'appliquera à toute vente ou livraison faite ou à être faite par un non-commerçant à un commerçant, de toutes denrées, produits, effets ou choses." Ces dispositions ont été reproduites dans les sections 17 et 18 du ch. 82 des S. R. B. C. de 1861, intitulé: "Acte concernant certains sujets du ressort de l'administration de la justice en général, ainsi que certaines actions et matières spéciales de procédure." Ces sections étaient en ces termes: 17. "Dans la preuve de tous faits concernant les affaires de commerce, on aura recours dans toutes les cours de juridiction civile dans le Bas-Canada, aux règles de témoignage prescrites par les lois d'Angleterre. 18. La loi quant à la preuve de tous faits concernant les affaires de commerce, en force dans le Bas-Canada, s'appliquera à toute vente ou livraison faite par un non-commerçant à un commerçant, de toutes denrées, produits, effets ou choses." Il a été jugé, sous les dispositions des sections 17 et 18 du ch. 82, S.R.B.C. de 1861, que la preuve de la vente d'un coffre de sûreté, pour un prix excédant $50, consentie par un aubergiste à un commerçant à qui il était en-

detté, et délivré à ce dernier, pouvait se faire par témoins à l'encontre du locateur qui réclamait un privilège comme tel sur ce coffre ; cette vente étant une affaire de commerce dans le sens desdites sections. (*Archibald et al.* vs *Shaw*, et *McDonald et vir*, ints, C. S. R., Montréal, 28 juin 1870, BERTHELOT, J., MACKAY, J., et BEAUDRY, J., confirmant le jugement de C. C., Montréal, 15 décembre 1869, TORRANCE, J., 14 J., p. 277, et 20 R. J. R. Q., p. 223)

PREUVE. Celui qui est poursuivi pour une pénalité ne peut pas être examiné comme témoin contre lui-même. On doit suivre à cet égard les règles du droit anglais sur la preuve. (*Lami* vs *Rabouin*, C. S., Trois-Rivières, 15 avril 1870, POLETTE, J., 1 R. L., p. 687, et 20 R. J. R. Q., p. 433)

" Le défendeur poursuivi pour le recouvrement de la valeur d'un cheval que le demandeur dit lui avoir donné en gage, lui offrant le montant de la créance garantie par ce gage, peut prouver par témoin qu'il n'a pas eu ce cheval en gage, mais qu'il l'a acheté du demandeur, et ce, quoique le défendeur dise qu'il a payé ce cheval une somme excédant $50 ; la possession du cheval par le défendeur équivalant à un commencement de preuve par écrit. (*Lefebvre* vs *Bruneau*, C.S.R., Montréal, 30 avril 1870, MACKAY, J., TORRANCE, J., et BEAUDRY, J., infirmant les décisions de BERTHELOT, J., 14 J., p. 268, et 20 R. J. R. Q., p. 196)

" Le syndic à une faillite, cessionnaire d'une police d'assurance, peut prouver par témoins l'intérêt que l'assuré a dans l'immeuble assuré. (*Whyte* et *The Home Insurance Company*, C. S., Montréal, 30 septembre 1870, TORRANCE, J., 14 J., p. 301 ; 2 R. C., p. 232, et 20 R. J. R. Q., p. 244)

" :—*Vide* ASSURANCE MARITIME.

" :— " ENQUÊTE.

" :— " MÉDECIN.

" :— " FEMME MARIÉE.

" EN MATIERE CRIMINELLE. Lorsque deux complices d'un acte criminel sont accusés, dans deux actes d'accusation séparés, d'avoir commis l'acte conjointement, ils sont témoins compétents, l'un contre l'autre, en faveur de la couronne, ou l'un pour l'autre, contre la couronne. Cette compétence a lieu même lorsqu'un verdict a été rendu contre le complice appelé comme témoin, pourvu que la sentence n'ait pas été prononcée sur le verdict ; dans ce cas, la crédibilité du témoin est entièrement laissée à l'appréciation du jury. (*Regina* vs *Pelletier et Tellier*, C. B. R., Montréal, 9 mars 1870, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., 1 R. L., p. 565 ; 3 R. L., p. 124 ; 15 J., p. 146, et 20 R. J. R. Q., p. 377)

" TESTIMONIALE:—*Vide* PREUVE.

PRIVILEGE DU LOCATEUR. Le locateur qui fait saisir, par droit de suite, un effet mobilier soumis à son privilège et qui a été vendu à un tiers par le locataire, et qui se fait mettre en possession de cet effet par l'huissier saisissant et du consentement du locataire le remet à un tiers encanteur pour le vendre et appliquer le produit de la vente en déduction du loyer et discontinue sa saisie-gagerie, perd son privilège après l'expiration des délais pour l'exercer par droit de suite, et l'acquéreur de cet objet par la vente à lui faite antérieurement par le locataire, peut revendiquer cet effet entre les mains du tiers chez qui il a été déposé par le locateur, comme susdit. Arts 1624, 1994 et 2005 C.C., et 873 C.P.C. (*Archibald et al.* vs *Shaw*, et *McDonald et vir*, Ints, C. S. R., Montréal, 28 juin 1870, BERTHELOT, J., MACKAY, J., et BEAU-

DRY, J., confirmant le jugement de C. C., Montréal, 15 décembre 1869, TORRANCE, J., 14 J., p. 277, et 20 R. J. R. Q., p. 223)

PRIVILEGE DU VENDEUR. Celui qui vend, sans terme, des pierres à un entrepreneur pour la construction d'une maison, et qui livre ces pierres sur le terrain où elles doivent être employées à cette construction, peut, après huit jours de la vente et de la livraison, poursuivre l'entrepreneur pour le prix des pierres et les saisir par saisie conservatoire, et demander qu'elles soient vendues pour qu'il soit payé, par privilège, du prix de la vente, et ce, en mettant en cause le propriétaire du terrain et de la maison que l'entrepreneur construit, et ce propriétaire ne pourra garder ces pierres, s'il ne prouve pas qu'avant la saisie il en avait payé la valeur à l'entrepreneur. Art. 2000 C. C. (*Lavoie* vs *Cassant*, et *Clendinning*, mis en cause, C. C., Montréal, 2 Avril 1870, TORRANCE, J., 14 J., p. 225, et 20 R. J. R. Q., p 156)

PROCEDURE. Le cautionnement en appel, dans les appels de la Cour de Circuit, doit, à peine de nullité, mentionner une somme déterminée pour laquelle les cautions se rendent responsables. On doit y annexer les affidavits par lesquels les cautions ont justifié de leur solvabilité ; sinon, le cautionnement sera rejeté, même si l'intimé n'a pas invoqué cette cause de nullité. (*La Fabrique de Sainte-Julie-de-Somerset* et *Paquet*, C. B. R. en appel, Québec, 20 juin 1868, DUVAL, J. en C., CARON, J. (*dissident*), DRUMMOND, J., BADGLEY, J., 1 R. C., p. 233, et 20 R. J. R. Q., p. 352)

" Un jugement n'est pas nul parce qu'il ne contient pas toutes les énonciations mentionnées dans l'article 472 C. P. C. (*La Fabrique de Sainte-Julie-de-Somerset* et *Paquet*, C. B. R. en appel, Québec, 20 juin 1869, DUVAL, J., CARON, J., MONK, J., et MACKAY, J., confirmant le jugement de C. S., STUART, J., 1 R. C., p. 430, et 20 R. J. R. Q., p. 353)

" Lorsque le dossier dans une poursuite sur *capias* est devant la Cour de Revision sur une inscription pour obtenir la revision d'un jugement de la Cour Supérieure cassant la *capias* sur requête, aucune procédure ne peut être prise dans la cause devant la Cour Supérieure, en première instance. Arts 498 et 823 C. P. C. (*Meigs et al.* vs *Aikin alias Curtis*, C. S., Montréal, 18 septembre 1869, MACKAY, J., 14 J., p. 84, et 20 R. J. R. Q., p. 29)

" Lorsque le tribunal de première instance a, sous les dispositions de l'article 320 C. P. C., permis d'amender la déclaration de manière à coïncider avec les faits prouvés, et a refusé au défendeur la permission de plaider à cet amendement, la Cour d'Appel n'interviendra pas en faveur du défendeur, vu que ce n'est qu'une question de procédure. (*Perry* et *de Beaujeu et al.*, C. B. R. en appel, Montréal, 9 décembre 1869, DUVAL, J. en C., CARON, J., DRUMMOND, J., et BADGLEY, J., 14 J., p. 334, et 20 R. J. R. Q., p. 285)

" Une motion pour faire rejeter une requête civile, parce que les raisons invoquées dans cette requête sont insuffisantes pour en faire obtenir les conclusions, ne peut être accordée, parce qu'un tel moyen ne peut être invoqué par une défense en droit. Arts 135 et 147 C. P. C. (*Lambert* vs *Gaucin*, C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 47, et 20 R. J. R. Q., p. 291)

" La contestation est liée par la demande, les exceptions et les réponses aux exceptions, quand ces réponses sont générales et ne contiennent aucun fait non articulé dans la demande. Art. 148 C. P. C. (*Cochrane et al.* vs *Bourne et al.*, C. S.,

Montréal, 27 avril 1869, TORRANCE, J., 13 J., p. 168; 19 R. J. R. Q., p. 232, et 20 R. J. R. Q., p. 227)

PROCEDURE. Les parties devant la cour de police ne peuvent plaider qu'en personne ou représentées par un procureur *ad litem* ou avocat; elles ne peuvent se faire représenter par un autre personne. (*Le Capitaine du vaisseau étranger Anna-Delius* vs *Paulson*, C. P., Québec, 19 juin 1869, le JUGE DES SESSIONS, 3 R. L., p. 524, et 20 R. J. R. Q., p. 243)

" Lorsque deux parties dans une cause, ont soulevé deux contestations distinctes et se joignent dans un appel du jugement qui leur est contraire, l'intimé pourra obtenir de la Cour d'Appel la permission de produire une comparution distincte sur chaque contestation soulevée par les appelants en cour de première instance. (*The Glen Brick Co. et al.* et *Shackell*, C. B. R. en appel, Montréal, 17 septembre 1871, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., 16 J., p. 257, et 20 R. J. R. Q., p. 170)

" Les défenses ou réponses en droit doivent se juger suivant les allégations contenues dans la déclaration ou les plaidoyers, sans égard aux documents produits dans la cause; ces défenses ou réponses ne devant s'attaquer qu'aux allégations mêmes. Art. 147 C. P. C. (*King* vs *Filiatrault et al.*, et *Tunstall et al.*, C. S., Montréal, 28 février 1870, TORRANCE, J., 14 J., p. 197, et 20 R. J. R. Q., p. 119)

" Lorsqu'une déclaration contient des allégations incompatibles et inconciliables les unes avec les autres, les allégations d'un premier chef établissant un état de chose qui est contredit par les allégations d'un second chef, et les allégations d'un second chef alléguant la nullité de substitutions dont le troisième chef admet la validité, le défendeur doit s'en prévaloir par une exception préliminaire, et il ne peut le faire par une défense au fond en droit. (*King* vs *Filiatrault et al.*, et *Tunstall et al.*, C. S., Montréal, 28 février 1870, TORRANCE, J., 14 J., p. 197, et 20 R. J R. Q., p. 119)

" Il n'y a pas lieu de demander le rejet d'une demande de plaider, vu que cette procédure n'affecte pas la cause; les procédés subséquents à cette demande pouvant seuls l'affecter; et, s'il y a eu demande de plaider irrégulièrement faite, et ensuite forclusion de plaider, alors, ce sera le temps de se pourvoir. Art. 137 C. P. C. (*Armstrong* vs *Barthe*, C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 49, et 20 R. J. R. Q, p. 292)

" :— *Vide* APPEL AU CONSEIL PRIVÉ.
" :— " ASSIGNATION.
" :— " ASSURANCE CONTRE L'INCENDIE.
" :— " BOIS SUR LES TERRES PUBLIQUES.
" :— " CAPIAS.
" :— " CAUTIONNEMENT POUR FRAIS.
" :— " CERTIORARI.
" :— " COMMISSION ROGATOIRE.
" :— " COMPAGNIE INCORPORÉE.
" :— " COMPENSATION.
" :— " COMPÉTENCE.
" :— " CONTESTATION LIÉE.
" :— " CORPORATION COMMERCIALE ÉTRANGÈRE.
" :— " DÉCRET.
" :— " DÉSISTEMENT.
" :— " ENQUÊTE.
" :— " EXCEPTION PRÉLIMINAIRE.
" :— " FAILLITE.
" :— " FORCLUSION.

PROCEDURE :—*Vide* GARANTIE DU VENDEUR.
" :— " GARDIEN D'OFFICE.
" :— " MINORITÉ.
" :— " OPPOSITION A FIN D'ANNULER.
" :— " " " DE DISTRAIRE.
" :— " PRESCRIPTION.
" :— " PROCÈS PAR JURY.
" :— " SAISIE D'IMMEUBLES.
" :— " " REVENDICATION.
" :— " TRANSACTION.
" :— " TIERCE-OPPOSITION.
" :— " VENTE DE PROPRIÉTÉ POUR TAXES MUNICIPALES.
" CRIMINELLE :—*Vide* RÉCUSATION DES JURÉS.
" EN MATIERE CRIMINELLE. Le fait que le juge, lors du procès d'une personne accusée du délit mentionné dans la sec 73 du ch. 92 des S. R. C. de 1859, aurait admis une preuve illégale, n'invalidera pas le verdict du jury trouvant l'accusé coupable, si, lors de sa charge au jury, le juge a déclaré qu'il ne devait pas prendre en considération la preuve qu'il avait ainsi admise, et s'il n'apparaît pas que, malgré cette déclaration, le jury a été influencé par cette preuve. (*La Reine* vs *Fraser*, C. B. R. en appel, Montréal, 9 juin 1870, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., confirmant le jugement de MACKAY, J., 14 J., p. 245, et 20 R. J. R. Q., p. 172)
" EN MATIERE CRIMINELLE. Dans un procès pour le délit mentionné dans la sec. 73 du ch. 92 des S. R. C. de 1859, et avant le premier janvier 1870, date de la mise en force du statut du Canada de 1869, 32-33 Vic., ch 29, intitulé: "Acte concernant la Procédure dans les causes criminelles ainsi que certaines autres matières relatives à la loi criminelle," sec. 38, il était permis à la couronne de faire mettre de côté tout juré jusqu'à ce que la liste fut épuisée. (*La Reine* vs *Fraser*, C. B. R. en appel, Montréal, 9 juin 1870, DUVAL, J. en C., CARON, J., DRUMMOND, J. (*dissident*), BADGLEY, et MONK, J. (*dissident*), confirmant la décision de MACKAY, J., 14 J., p. 245, et 20 R. J. R. Q., p. 172)
" EN MATIERE CRIMINELLE. Dans un procès contre un accusé sous les dispositions de la section 73 du ch. 92 des S. R. C. de 1859, intitulé: "Acte concernant les délits contre la personne et la propriété," qui se lit comme suit: "Quiconque obtient une chose quelconque, avec intention de frauder, sera coupable d'un délit, et sera emprisonné pour une période de pas plus de deux ans, et condamné ou non aux travaux forcés," pour avoir acheté des marchandises dans un temps où l'accusé se savait complètement insolvable et incapable de les payer, il sera permis à la poursuite de faire entendre des témoins pour prouver qu'il a fait des achats semblables et dans les mêmes circonstances d'autres personnes. (*La Reine* vs *Fraser*, C. B. R. en appel, Montréal, 9 juin 1870, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., confirmant le jugement de C. S., MACKAY, J., 14 J., p. 245, et 20 R. J. R. Q., p. 172)
PROCES PAR JURY. L'option pour un procès par jury faite par la réponse au plaidoyer du défendeur n'est pas suffisante pour donner droit au procès par jury; il faut, dans ce cas, une demande spéciale présentée au tribunal dans les quatre jours qui suivent la contestation liée, ou si les quatre jours expirent hors du terme, alors la demande peut être faite le premier jour du terme suivant, et la déclaration d'option pour procès par jury faite dans la réponse peut servir

comme avis donné à la partie adverse, tel que requis par l'article 350 C. P. C. (*Mathews* vs *The Northern Assurance Company*, C. S., Montréal, 23 février 1870, BEAUDRY, J., 14 J., p. 138; 2 R. L., p. 185, et 20 R. J. R. Q., p. 43)

PROCES PAR JURY. Lorsqu'en réponse à une question qui leur est soumise, les jurés expriment une opinion légale, le tribunal peut rendre jugement sur le verdict, sans égard à cette opinion des jurés qui ne doit pas être considérée; mais si, en réponse à une question, les jurés donnent une réponse sur le fait contraire à la preuve, le tribunal ne peut passer outre et donner jugement contrairement à cette réponse. Tout ce qu'il peut faire, dans ce cas, c'est d'accorder un nouveau procès. (*Whyte* vs *The Western Assurance Company*, Conseil Privé, 9 mars 1875, confirmant le jugement de C. B. R. en appel, Montréal, 20 septembre 1873, DUVAL, J. en C., DRUMMMOND, J., BADGLEY, J., dissident, MONK, J., dissident, et TASCHEREAU, J., qui confirmait le jugement de C. S. R., Montréal, 30 avril 1872, BERTHELOT, J., MACKAY, J., et BEAUDRY, J., qui approuvait la charge aux jurés de TORRANCE, J., 22 J., p. 215; 7 R. L., p. 106, et 20 R. J. R. Q., p. 249)

" PAR JURY :—*Vide* ASSURANCE CONTRE L'INCENDIE.

" " :— " JURÉ EN MATIÈRE CIVILE.

" -VERBAL :—*Vide* FOSSÉ DE LIGNE.

" " :— " SURINTENDANT SPÉCIAL.

PROCUREUR AD LITEM :—*Vide* TRANSACTION.

PROHIBITION. Le droit de surveillance accordé aux tribunaux supérieurs sur les autres tribunaux, peut s'exercer au moyen d'un bref de prohibition. Il n'est pas nécessaire pour l'obtenir de déclarer qu'il n'y a pas d'autre moyen de garantir ses droits; mais il suffit de se plaindre que les juges de paix n'avaient pas juridiction, qu'ils ont procédé injustement et illégalement ou ont refusé de rendre justice. Art. 1031 C. P. C. (*Dubord* vs *Boivin*, C. S., Saint-Hyacinthe, 22 novembre 1866, SICOTTE, J., 14 J., p. 203, et 20 R. J. R. Q., p. 126)

" La corporation municipale ayant nom "Le maire et les conseillers de la ville de Sorel," qui, par les dispositions de la section 37 du ch. 75 des statuts du Canada de 1860, 23 Vict., intitulé : "Acte pour incorporer la ville de Sorel," a le droit d'émaner, sous le sceau du maire, un mandat autorisant la saisie et vente des meubles et effets de toute personne tenue de payer les cotisations qui lui sont imposées, et qui néglige de faire ce paiement pendant l'espace de trente jours après que demande lui en aura été faite, est un tribunal inférieur à qui un bref de prohibition peut être adressé; mais un contribuable dont les meubles et effets sont ainsi saisis, en vertu d'un mandat sous le seing du maire, pour prélever le montant des cotisations qui lui ont été imposées, ne peut obtenir un bref de prohibition, sur son allégation que la corporation lui serait endettée pour un montant plus considérable que celui pour lequel il est saisi, et qu'il y a lieu à la compensation des créances, vu que, dans ce cas, il n'y a pas eu excès de juridiction, parce que le maire avait droit d'émaner un mandat de saisie sur le rôle de perception homologué qui constatait que les cotisations étaient dues, et vu qu'il faut que l'excès de juridiction apparaisse à la face même des procédés pour donner juridiction. (*Armstrong*, requérant prohibition, C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 48, et 20 R. J. R. Q., p. 292)

" :—*Vide* ACTE DE TEMPÉRANCE DE 1864.

" :— " LICENCE D'AUBERGE.

PROMESSE DE VENTE :—*Vide* VENTE.
PROPRIETE :—*Vide* RIVIÈRES NAVIGABLES ET FLOTTABLES.
PROTONOTAIRE :—*Vide* DÉPÔT.
" :—*Vide* REQUÊTE CIVILE.

Q

QUESTIONS RESERVEES DANS LES CAUSES CRIMINELLES. L'audition et la décision d'une question réservée par la cour du Banc de la Reine, siégeant au criminel, sous les dispositions de la section 57 du ch. 77 des S. R. B. C. de 1861, intitulé: "Acte concernant la cour du Banc de la Reine," dans un procès pour délit, pourra se faire en l'absence de l'accusé qui, après le verdict rendu contre lui, aurait fui la justice. (*La Reine* vs *Fraser*, C. B. R. en appel, Montréal, 9 juin 1870, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., confirmant le jugement de MACKAY, J., 14 J., p. 245, et 20 R. J. R. Q., p. 172)

QUO WARRANTO. En 1856 fut passé le statut du Canada 19-20 Vic., ch. 141, intitulé: "Acte pour autoriser les membres de l'église unie d'Angleterre et d'Irlande en Canada, à s'assembler en synode." Le 16 avril 1858, fut passé le ch. 139, des statuts du Canada de 1858, 22 Vic., intitulé: "Acte pour expliquer et amender l'acte intitulé: "*Acte pour autoriser les membres de l'église unie d'Angleterre et d'Irlande en Canada, à s'assembler en synode.*" Le préambule de ce statut de 1858 déclare qu'il existe des doutes s'il se trouve dans l'acte de 1856, des dispositions suffisantes pour autoriser les laïques de l'église unie d'Angleterre et d'Irlande d'être représentés aux synodes dont la réunion est autorisée par ledit acte, et qu'il est à propos de faire disparaître ces doutes. La sec 1 du statut de 1858 contient la disposition suivante: "Pour toutes les fins dudit acte, les laïques s'assembleront par représentants, et jusqu'à ce qu'il en soit autrement décidé par le synode de chaque diocèse, il pourra être élu un délégué ou plus (mais dont le nombre n'excédera pas trois en aucun cas) aux assemblées annuelles de Pâques dans chaque paroisse, mission ou cure, dans le diocèse, ou dans le cas où il pourra y avoir plus d'une congrégation, dans toute paroisse, mission ou cure alors dans chaque telle congrégation ou aux assemblées qui seront convoquées spécialement à cette fin par tout ministre qui remplira un bénéfice à charge d'âme; et tous laïques appartenant à telle paroisse, mission ou cure ou appartenant à telle congrégation ayant atteint l'âge révolu de vingt et un ans, qui reconnaîtront par écrit, à ladite assemblée, "être membres de l'église unie d'Angleterre et d'Irlande, et n'appartenir à aucune autre dénomination religieuse," auront droit de voter à ladite élection. Chaque délégué recevra du président de l'assemblée un certificat de son élection qu'il produira audit synode lorsqu'il en sera requis; et la première assemblée dudit synode sera convoquée par l'évêque du diocèse en tels temps et lieux qu'il jugera à propos." Il a été jugé, sous ces dispositions, que la synode ne peut s'enquérir de la légalité de l'élection d'un délégué qui est porteur d'un certificat de son élection à lui donné par le président de l'assemblée, et que la deuxième clause de la constitution dudit synode qui exige des électeurs à l'élection des délégués, qu'ils soient propriétaires de bancs ou de sièges dans l'église, est constitutionnelle. (*Davidson* et *Baker*, C. S., Montréal, 30 avril 1870, MACKAY, J., 14 J., p. 165; 2 R. L., p. 189, et 20 R. J. R. Q., p. 94)

R

RÉCUSATION DES JURÉS. La Couronne a droit de récuser, sans montrer cause, tout juré qu'elle juge à propos, jusqu'à ce que la liste soit épuisée, dans les cas de délit aussi bien que dans les cas de félonie. Code Criminel, art. 669. (*La Reine* vs *Hogan et al.*, C. B. R., justice criminelle, Montréal, 4 octobre 1865, MONDELET, J., 1 L. C. L. J, p. 70; 18 R. J. R. Q., p. 150, et 20 R. J. R. Q., p. 180)

" DES JURES. Lorsque, dans un procès criminel pour félonie, la Couronne, sur le premier appel du petit jury, a demandé qu'un des jurés appelés se tienne à l'écart, elle pourra de nouveau, sur un second appel, demander que le même juré se tienne à l'écart jusqu'à ce que le tableau soit épuisé, et elle n'est pas tenue de récuser pour cause et de donner des raisons au second appel, s'il y a encore des jurés pour former le tableau qui doit faire le procès. (*La Reine* vs *Lacombe*, C. B. R. en appel, Montréal, 10 septembre 1869, DUVAL, J. en C., CARON, J., DRUMMOND, J. (*dissident*), BADGLEY, J., et MONK, J., confirmant le jugement de C. B. R., justice criminelle, Montréal, 5 juillet 1869, MACKAY, J., 13 J., p. 259; 18 R. J. R. Q., p. 505, et 20 R. J. R. Q., p. 180)

RECORDER:—*Vide* RÈGLEMENT MUNICIPAL.

REGLEMENT MUNICIPAL. Par le § 4 de la sec. 10 du ch. 72 des Statuts du Canada de 1860, 23 Vic., intitulé: "Acte pour amender les dispositions des différents actes pour l'incorporation de la cité de Montréal," le conseil de ladite cité fut autorisé à faire des règlements pour autoriser la saisie et confiscation des grains, fleur, beurre, patates et autres végétaux, articles et effets transportés aux marchés de ladite cité, pour être vendus ou autrement, à raison de défaut dans la mesure, le poids ou la qualité ou pour toute autre bonne et suffisante cause; par la sec. 13 de ce statut, le conseil est autorisé à imposer par tout tel règlement, telles amendes n'excédant pas $20, ou tel emprisonnement n'excédant pas 30 jours, ou l'un ou l'autre, suivant qu'il le jugera nécessaire pour mettre à exécution lesdits règlements. Par la sec. 50 du ch. 60 des Statuts du Canada de 1864, 27-28 Vic., intitulé: "Acte pour amender les actes relatifs à la corporation de la cité de Montréal, et pour d'autres fins," le conseil de ladite cité "est autorisé, dans tout règlement ou ordonnance passée pour quelqu'un des objets définis dans l'acte d'incorporation de ladite cité, ou dans aucun acte l'amendant, dans le but de mettre en force les dispositions de tel règlement, d'imposer une amende n'excédant pas vingt dollars, et les frais de poursuite, et l'emprisonnement dans la prison commune, ou dans la maison de correction, aux travaux forcés, pour un temps n'excédant pas un mois de calendrier." Par la sec. 17 du ch. 70 du statut de Québec de 1869, 32 Vic., intitulé: "Acte pour amender les actes relatifs à la corporation de la cité de Montréal, et pour d'autres fins," en outre du pouvoir à lui déjà accordé, dans et par son acte d'incorporation, et les divers actes qui l'amendent, pour la mise en force des règlements passés en vertu desdits actes, pour les fins mentionnées dans lesdits actes, le conseil fut autorisé d'imposer, dans et par tels règlements, une amende n'excédant pas vingt piastres et les frais de poursuite que l'on pourra aussitôt lever sur les biens et effets du défendeur; ou de statuer qu'à

défaut de paiement immédiat de ladite amende et les frais, le défendeur pourra être emprisonné dans la prison commune, pour une période n'excédant pas deux mois ; ou d'imposer ladite amende et les frais, en sus dudit emprisonnement. Par un règlement passé par ledit conseil, le 7 juin 1869, il était décrété que "toute personne qui enfreindra aucune des dispositions de ce règlement paiera une amende n'excédant pas 20 piastres, ou sera passible d'un emprisonnement n'excédant pas 30 jours pour chaque telle offense" Il a été jugé que ce règlement est illégal en autant qu'il donne une discrétion au recorder quant au montant de l'amende, discrétion qui, par les statuts, n'a été accordée qu'au conseil lui-même. Une conviction prononcée sous les dispositions de ce règlement, ordonnant l'emprisonnement à défaut du paiement immédiat de l'amende, est illégale, vu que le règlement permet l'amende ou l'emprisonnement d'une manière alternative, mais ne permet pas l'emprisonnement à défaut du paiement de l'amende. Une conviction faite sous ce règlement, accordant des frais au plaignant, est encore illégale, vu que le règlement ne donne pas juridiction au recorder quant aux frais. Ainsi lorsque la loi permet au conseil d'une corporation municipale d'exercer une discrétion quant à l'imposition d'une amende ou d'un emprisonnement, ce conseil doit exercer cette discrétion lui-même, et ne peut la faire exercer par le recorder ou le juge de paix. (*Marry* vs *Le maire, les échevins et conseillers de la cité de Montréal*, C. S., Montréal, 18 décembre 1869, TORRANCE, J., 14 J., p. 163, et 20 R. J. R. Q., p. 91)

REGLEMENT MUNICIPAL :—*Vide* CORPORATION MUNICIPALE.

RENONCIATION A SUCCESSION. Une action intentée contre un héritier qui n'avait pas renoncé à la succession et qui comparait et plaide une renonciation ultérieure à l'introduction de la demande, sera renvoyée, mais cet héritier devra payer les frais de contestation. (*Société de construction du district et de la cité de Montréal* vs *Kerfut et al.*, C. S., Montréal, 30 novembre 1859, BERTHELOT, J., 4 J., p. 54, et 20 R. J. R. Q., p. 153)

" A SUCCESSION. L'héritier poursuivi pour une dette de la succession, qui plaide que le *de cujus* est mort insolvable, qu'il n'a rien reçu de cette succession, et qu'il ne l'a jamais acceptée, et ne produit une renonciation formelle qu'à l'audition au mérite, sera condamné aux dépens de la poursuite qui, en conséquence de cette renonciation, sera renvoyée. Art. 656 C. C. (*Mulholland et al.* vs *Halpin et al.*, C. S., Montréal, 29 novembre 1873, TORRANCE, J., 17 J., p. 318 ; 5 R. L., p. 184, et 20 R. J. R. Q., p. 152)

RENTE :—*Vide* RENTE VIAGÈRE.

" VIAGERE. L'obligation par un donataire de payer une rente viagère au donateur, consistant en une quantité déterminée *du meilleur blé qui poussera sur le terrain donné*, oblige le donataire a fournir du bon blé. Le donateur, lorsqu'il s'est réservé du bon blé, c'était afin d'avoir du pain pour vivre. Si la terre ne produit pas du bon blé, le donataire doit en acheter pour payer sa rente. (*Lalonde* vs *Cholette*, C. B. R. en appel, Montréal, 9 juin 1868, DUVAL. J., AYLWIN, J., CARON, J. (*dissident*), BADGLEY, J., et DRUMMOND, J., infirmant le jugement de C. S., 1 R. L., p. 700, et 20 R. J. R. Q., p. 461)

REPRÉSENTATION :—*Vide* SUBSTITUTION.

REPRISES MATRIMONIALES :—*Vide* FEMME MARIÉE.

REQUETE CIVILE.—L'ordre de sursis sur une requête civile pour em-

pêcher ou arrêter l'exécution du jugement, peut être donné par le protonotaire en vacance en l'absence du juge résidant dans le district. Art. 507 C. P. C. (*Lambert* vs *Gaucin*, C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 47, et 20 R. J. R. Q., p. 291)

REQUETE CIVILE :—*Vide* PROCÉDURE.

RESPONSABILITE. La crue extraordinaire des eaux d'une rivière qui entraîne une quantité de billots qui descendent cette rivière, et brise et endommage une chaussée barrant cette rivière, constitue un cas fortuit qui soustrait le propriétaire des billots à la responsabilité quant aux dommages éprouvés par le propriétaire de la chaussée. (*Béliveau et al.* et *Levasseur*, C. S., Trois-Rivières, 1869, 1 R. L., p. 720, et 20 R. J. R. Q., p. 468)

" Les corporations municipales ont été établies spécialement pour maintenir les chemins dans un ordre parfait, afin de pouvoir, non seulement y voyager, mais y voiturer de lourdes charges, en toutes saisons de l'année, et elles sont responsables, vis-à-vis des particuliers, de tous les dommages résultant du mauvais état de ces chemins, soit parce que des voitures y sont brisées, soit parce que ceux qui y passent ne peuvent conduire des charges aussi lourdes qu'ils mettraient si les chemins étaient beaux. (*Gaudet* vs *Corporation du Canton de Chester-Ouest*, C. S., Arthabaska, 1869, POLETTE, J., 1 R. L., p. 75, et 20 R. J. R. Q., p. 296)

" Le mari commun en biens avec sa femme, n'est pas responsable d'une condamnation pécuniaire encourue par elle pendant le mariage et avant la dissolution de la communauté pour crime ou délit, mais si le mari étant poursuivi en dommages conjointement avec sa femme pour délit de cette dernière, défend à cette action conjointement avec elle, il doit être condamné comme commun aux dépens, dommages et intérêts ; il en serait autrement s'il avait défendu séparément de sa femme. (*Rocheleau* vs *Rocheleau et al.*, C. C., Montréal, 18 décembre 1869, TORRANCE, J., 14 J., p. 194, et 20 R. J. R. Q., p. 117)

" :—*Vide* COMMISSAIRE D'ÉCOLE.

" :— " CORPORATION MUNICIPALE.

" :— " FEMME SÉPARÉE DE BIENS.

" :— " RIVIÈRES NAVIGABLES ET FLOTTABLES.

" :— " VENTE DE PROPRIÉTÉ POUR TAXES MUNICIPALES.

REVISION. Lorsque le montant du jugement n'excède pas $100, quoique le montant demandé excédât cette somme, il n'y a pas lieu à la revision de ce jugement, si le créancier se contente du jugement rendu. (*Lefebvre* vs *Murdock*, C. S. R., Montréal, 30 novembre 1869, MONDELET, J., BERTHELOT, J., MACKAY, J., 13 J., p. 328 ; 19 R. J. R. Q., p. 434, et 20 R. J. R. Q., p. 154)

" La cour de revision n'a pas juridiction pour reviser la taxe d'un mémoire de frais en revision. (*Belisle* vs *Lyman et al.*, C. S. R., Montréal, 28 février 1870, MONDELET, J., BERTHELOT, J., et MACKAY, J., 14 J., p. 137 ; 2 R. L., p. 185, et 20 R. J. R. Q., p. 41)

" :—*Vide* ACQUIESCEMENT.

" DEVANT TROIS JUGES :—*Vide* PROCÉDURE.

RIVIERES NAVIGABLES ET FLOTTABLES. Il y a des rivières perpétuelles, et d'autres qui ne le sont pas. Une rivière perpétuelle est celle dont l'eau coule toujours. Une rivière non perpétuelle ou un torrent est celle dont les eaux ne coulent qu'en hiver. Si cependant une rivière se dessèche pendant un été contre son ordinaire, elle n'en sera pas moins une

rivière perpétuelle. Il y a aussi des rivières publiques et d'autres qui ne le sont pas. Les rivières publiques sont celles que la loi (art. 400 C. C.) déclare navigables et flottables. La rivière flottable est sur le même pied que la rivière navigable; l'une et l'autre sont du domaine public, et les droits d'usage que les particuliers peuvent exercer dans les deux sont réglés par les mêmes lois. L'art. 400 C. C. n'est pas introductif d'un droit nouveau. Les lois antérieures rangeaient dans le domaine public les rivières flottables comme les rivières navigables. Dans l'acception la plus étendue du mot, on comprend parmi les rivières navigables celles qui sont flottables en trains, parce que c'est là une espèce de navigation. Les trains se meuvent à l'aide de moyens analogues à ceux qu'emploient les bateaux, le halage, la rame, le gouvernail, et c'est ainsi que s'exprimaient les anciennes ordonnances. Le premier bateau fut un radeau. Il y a une différence spécifique entre les rivières navigables et les rivières flottables, parce que, si les premières sont toujours susceptibles d'être consacrées au flottage, un cours d'eau flottable n'est pas toujours également propre à la navigation, des trains pouvant aisément, à raison du moindre tirant d'eau, franchir des bas-fonds impraticables pour des bateaux, cette différence n'influe pas sur la dominialité, qui dérive de la consécration aux transports publics; et, quand l'article 538 du Code Napoléon (cet article est en ces termes: " Les chemins, routes et rues à la charge de l'Etat, les fleuves et rivières navigables ou flottables, les rivages, lais et relais de la mer, les ports, les havres, les rades, et généralement toutes les portions du territoire français qui ne sont pas susceptibles d'une propriété privée, sont considérés comme des dépendances du domaine public,") a compris, avec plus de précision que les anciens Édits, parmi les dépendances du domaine public tous les fleuves et rivières navigables ou flottables, ce n'est pas un droit nouveau qu'il a introduit. Les rivières navigables ou flottables ont toujours fait partie du domaine public. On ne doit rien faire sur un fleuve public, ou sur ses rives, et n'y jeter rien qui en fasse couler l'eau autrement que l'été précédent, ou qui empêche ou doive empêcher la navigation, ou l'usage de sa rade. Personne n'a le droit de barrer une rivière flottable, de manière à gêner la descente des bois ou à les faire accumuler. La loi ne défend pas toute espèce d'ouvrage dans un fleuve public, ou sur ses rives; elle défend seulement ce qui en détériore la navigation ou les rades. On peut faire un ouvrage dans une rivière publique, ou sur ses rives, pour l'entretien de ses rives ou des champs voisins, pourvu qu'il ne détériore pas la navigation de cette rivière. On ne doit tolérer de réparations que celles qui ne nuisent pas à la navigation. Ainsi, celui qui a des maisons sur les deux rives d'une rivière publique ne peut y établir un pont de droit privé. On est censé détériorer la rade ou la navigation d'une rivière, soit qu'on rende sa navigation impossible, soit qu'on la rende seulement plus difficile ou plus lente; ainsi, soit qu'on en dérive l'eau, et qu'elle ne soit plus navigable, soit qu'on l'élargisse de manière que les eaux n'aient plus assez de profondeur, soit qu'on la rétrécisse et la rende trop rapide; soit enfin qu'on en rende la navigation incommode, plus difficile, ou impossible, on contrevient à la loi. La loi protège cette navigation comme le libre usage d'un chemin public. On ne doit faire

violence à personne pour l'empêcher de conduire un vaisseau ou un radeau sur une rivière publique et de décharger son vaisseau sur les rives de cette rivière. On ne doit pas non plus troubler la navigation sur un lac, un canal ou un étang publics. On peut détruire ce qui a été fait dans une rivière publique ou sur sa rive qui en détériore ou en doit détériorer la navigation. Celui qui a construit une chaussée à travers une rivière flottable est tenu d'empêcher l'accumulation des bois sur cette chaussée; et si, par cette accumulation, cette chaussée est endommagée, ce dommage est dû à sa négligence. Un arrêt du Parlement de Paris du 26 février 1569, ordonna à tous possesseurs de moulins ou forges d'avoir pertuis pour le flottage du bois, et permit aux marchands d'en faire faire où ils n'en trouveraient pas sur leur passage, avec défense à toute personne quelconque d'arrêter leurs marchandises dans le trajet. Les rivières navigables et flottables étant des voies publiques comme celles qui existent sur terre, pour les communications et les transports, devaient nécessairement faire partie du domaine public et être sous la juridiction immédiate de l'Etat qui, seul, pouvait au moyen de lois efficaces, en assurer l'usage aux particuliers. Aussi, trouvons-nous diverses ordonnances, protectrices de la navigation sur ces rivières, portées à différentes époques et même bien avant celle des eaux et forêts du mois d'août 1669. Il n'a jamais été permis, dans aucun temps, de faire aucuns édifices sur les rivières navigables et flottables sans permission du Roi. Personne n'a jamais pu y établir de moulins sans l'autorisation expresse du gouvernement. Charles VI, dans une ordonnance du mois de mai 1413, art. 246, ordonne de démolir et défaire des gords et autres choses à prendre poisson et des îles et autres empêchements dans les rivières publiques du royaume faits par les seigneurs et autres. Par une ordonnance de François I, du 12 août 1545, il a été ordonné que les écluses de la rivière Isaac, en la paroisse de Feugreal, et celles qui avaient été bâties sur les rivières de Loire, d'Ardres et Goulaines et autres ruisseaux entrant dans ladite rivière, seraient abattues, avec défense de les refaire et que la chaussée Barbin serait réduite aux bornes anciennes. Guénois, Conférence des ordonnances, vol. 3, p. 319, cite plusieurs arrêts qui ordonnent d'ôter des embarras dans les rivières, et de les nettoyer pour ne pas empêcher la navigation. Un arrêt du Parlement de Paris du dernier juillet 1571 défendit à qui que ce soit, sous prétexte de privileges, moulins et péage, d'empêcher les marchands en la voiture de leurs bois. Si permission était accordée de construire des ouvrages dans une rivière, il fallait toujours laisser un passage de 24 pieds pour les bateaux, etc., et si ces constructions étaient préjudiciables au commerce, elles pouvaient être enlevées. L'Ordonnance de 1415, celle de mai 1520 et celle d'octobre 1570, portent que les arches des ponts, voies, gords, pertuis, et tous autres passages étant sur les rivières navigables, doivent avoir 24 pieds de large, pour passer et repasser les bateaux et marchandises, et défendent à qui que ce soit d'empêcher lesdites arches, voies, gords, pertuis et autres passages, soit en les retrécissant ou autrement L'ordonnance de Henri III, art. 18, ordonne aussi de faire nettoyer les rivières, et de faire enlever les moulins et pêcheries dans les rivières, qui seraient trouvés préjudiciables au trafic et commerce d'icelles. Enfin l'article 42 du tit. 27 de l'Ordonnance des eaux et forêts décrète que: " Nul, soit propriétaire

ou engagiste, ne pourra faire moulins, batardeaux, écluses, gords, pertuis, murs, plants d'arbres, amas de pierre, de terres et de fascines, ni autres édifices ou empêchements nuisibles au cours de l'eau dans les fleuves et rivières navigables et flottables, enjoignant à toutes personnes de les ôter dans trois mois." D'après le droit anglais, d'accord en cela avec le droit français, le Souverain est le propriétaire des rivières navigables dans les pays de son obéissance; et l'on peut, là comme ici, ôter les embarras qui gênent la navigation. Il est aussi propriétaire des rives, c'est-à-dire du terrain, des mers, des rivières navigables, et des bras de rivières dans ses domaines, entre les hautes eaux et les basses, dans les marées ordinaires. Un embarras, dans une rivière publique est une nuisance, et peut être traité comme telle. Un propriétaire de billots a le droit de les descendre dans une rivière flottable, et il n'est permis à personne de l'en empêcher en obstruant le cours de cette rivière. Par la section 1 du chapitre 104 des S. du C. de 1856, 19-20 Vic., intitulé: "Acte pour autoriser l'exploitation des cours d'eau," tout propriétaire est autorisé à utiliser et exploiter tout cours d'eau qui borde, longe ou traverse sa propriété, en y construisant et établissant des usines, moulins, manufactures et machines de toute espèce, et, pour cette fin, y faire et pratiquer toutes les opérations nécessaires à son fonctionnement, telles que écluses, canaux, murs, chaussées, digues, et autres travaux semblables. Les dispositions de ce statut sont reproduites dans le chapitre 51 des S. R. B. C. de 1861, intitulé: "Acte concernant l'amélioration des cours d'eau." Ce statut ne s'applique pas aux grands cours d'eau qui font partie du domaine publique, comme les fleuves et les rivières navigables et flottables, et il n'a pas entendu autoriser et il n'autorise pas ces constructions dans ces rivières, mais seulement dans celles qui ne sont pas dans le domaine public. L'article 400 C. C. range les fleuves et les rivières navigables et flottables dans le domaine public, et on n'y trouve rien qui en autorise un usage autre que celui de la navigation et du flottage dont les particuliers ont toujours pu et peuvent jouir. Mais l'article 503 C. C., en parlant de l'eau courante ne faisant pas partie du domaine public, dit que "celui dont l'héritage borde une eau courante ne faisant pas partie du domaine public, peut s'en servir à son passage pour l'utilité de cet héritage, mais de manière à ne pas empêcher l'exercice du même droit par ceux à qui il appartient, sauf les dispositions contenues dans le chapitre 51 des Statuts Réfondus pour le Bas-Canada." Ces deux articles rapprochés l'un de l'autre et des lois antérieures, indiquent qu'on n'a pas entendu que le statut donnât l'autorisation de construire des usines, moulins, etc., dans les fleuves et rivières navigables et flottables. Si la législature avait eu l'intention de permettre ces constructions dans les rivières navigables et flottables, elle aurait prescrit des règles et conditions protectrices de la navigation et du flottage des bois, ce qu'elle n'a pas fait. Dans tous les cas, en supposant que ce statut s'appliquerait aux rivières navigables et flottables, il n'a toujours pas eu l'effet de rendre légales des constructions faites avant sa passation, et en contravention à la loi du temps. L'autorité souveraine peut accorder l'autorisation de construire certains ouvrages dans les fleuves et les rivières publiques, en y imposant des conditions et en prescrivant des règles pour sauvegarder les droits des particuliers et les intérêts de la navigation et du

commerce. Dans tous les cas, soit que le Statut de 1856 permette ou ne permette pas ces constructions dans les rivières navigables et flottables, celui qui construit une chaussée et moulin sur une de ces rivières, doit laisser dans les constructions qui sont faites avec autorisation dans une rivière navigable ou flottable, un passage de 24 pieds de largeur pour la descente des bois et pour le passage des nefs, bateaux et marchandises, suivant ce qui est requis par l'Ordonnance de Charles VI du mois de février 1415 et celle de François I, du mois de mai 1520, et, s'il ne laisse pas un tel passage et si sa chaussée éprouve des dommages par la descente des billots, il n'aura pas de recours contre le propriétaire de ces billots, ce dernier ayant droit à un passage de 24 pieds. La rivière Blanche dans le canton d'Aston, est une rivière flottable; on y descend des billots depuis bien des années, et elle est conséquemment dans le domaine public, suivant l'art. 400 C. C. et les lois antérieures, et tout particulier peut s'en servir pour y flotter ses bois, et personne n'a le droit d'y construire une chaussée qui la barre d'un bord à l'autre, sans en obtenir l'autorisation de l'autorité compétente. (*Béliveau et al.* vs *Levasseur et vir*, C. S., Trois-Rivières, 1869, POLETTE, J., 1 R. L., p. 720, et 20 R. J. R. Q., p. 468)

RUE:—*Vide* CORPORATION MUNICIPALE.

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SAISIE:—*Vide* BOIS SUR LES TERRES PUBLIQUES.

" -ARRET. Le tiers saisi contre lequel jugement a été rendu par défaut, peut faire opposition à ce jugement devant la cour qui l'a prononcé et est recevable à faire sa déclaration même après qu'un bref d'exécution a été émis contre lui en vertu dudit jugement, en payant les frais encourus jusqu'au jour de sa déclaration. (*Andrews* vs *Robertson*, C. S., Québec, 11 février 1851, BOWEN, J. en C., et MEREDITH, J., 1 D. T. B. C., p. 140, et 20 R. J. R. Q., p. 4)

" -ARRET. Le tiers saisi est recevable à faire sa déclaration après jugement rendu contre lui par défaut, en payant tous les frais jusqu'au jour de sa déclaration. (*Roy* vs *Scott*, et *Lemesurier et al.*, t.-s. et req., C. S., Montréal, 15 décembre 1852, DAY, J., VANFELSON, J., MONDELET, J., 3 D. T. B. C., p. 80, et 20 R. J. R. Q., p. 4)

" -ARRET APRES JUGEMENT. Le tiers saisi n'est pas partie dans la cause où il est requis de comparaître, mais il est tenu, sous l'autorité du tribunal, et pour l'avantage des parties dans la cause où il est assigné, d'agir comme gardien des effets saisis entre ses mains, et, conséquemment, les règles du droit, qui s'appliquent au jugement rendu entre les parties dans une cause, ne s'appliquent pas aux jugements relatifs aux tiers saisis qui ne sont pas telles parties en cause. Ainsi, le tiers saisi qui, sur une saisie-arrêt après jugement, a, par erreur, déclaré qu'il devait au défendeur un montant plus élevé que celui qu'il lui devait réellement, et a omis de déclarer un transport de la créance du défendeur contre lui, transport qui lui avait été signifié avant la saisie-arrêt, peut, même plus de quinze jours après jugement rendu conformément à sa déclaration, et alors que le jugement est exécutoire, obtenir, par une simple requête, permission de faire une nouvelle déclaration conforme aux faits, et se faire relever du jugement ainsi rendu contre

lui; et le tribunal peut, sur présentation de sa requête, suspendre l'exécution du jugement rendu jusqu'à ce qu'il soit adjugé sur icelle Art. 624 C. P. C. (*Atkinson* vs *Walker*, et *Sincennes et al.*, t.-s., C. S., Québec, 4 janvier et 9 septembre 1869, MEREDITH, J. en C., 14 J., p. 60, et 20 R. J. R. Q., p. 1)

SAISIE CONSERVATOIRE :—*Vide* PRIVILÈGE DU VENDEUR.

" " :— " VENTE.

" -EXECUTION DES IMMEUBLES : — *Vide* EXÉCUTION DES IMMEUBLES.

" -EXECUTION DES MEUBLES :—*Vide* GARDIEN D'OFFICE.

" D'IMMEUBLES. L'huissier chargé de l'exécution d'un bref d'exécution contre les immeubles, n'est pas tenu de faire son procès-verbal de saisie sur les immeubles mêmes; il peut valablement faire cette saisie et son procès-verbal au domicile du saisi. (*Senécal* vs *Vienne*, et *Vienne*, oppt., C. S. R., Montréal, 31 octobre 1871, MONDELET, J., TORRANCE, J., BEAUDRY, J., infirmant le jugement de C. S., Montréal, 30 mars 1871, MONDELET, J., 3 R. L., p. 523, et 20 R. J. R. Q., p. 242)

" D'IMMEUBLES :—*Vide* SEQUESTRE.

" DES MEUBLES :— " CONTRAINTE PAR CORPS.

" " :— " OPPOSITION A FIN D'ANNULER.

" REVENDICATION. Une saisie revendication peut être pratiquée contre le maître d'un navire sur son refus de signer le connaissement contenant l'état des marchandises chargées sur son vaisseau, et l'action être rapportée pour les dépens seulement, le connaissement ayant été signé après l'émission du bref, mais avant son exécution. Bien que les dépens ne fassent pas partie de la cause première de l'action, ils constituent néanmoins une partie de la demande, et, pour ce motif, le demandeur a autant de droit d'avoir jugement sur cette partie de sa demande que sur la première. (*McCulloch et al.* et *Hatfield*, C. B. R. en appel, Québec, 15 juin 1863, AYLWIN, J., dissident, DUVAL, J., MEREDITH, J., et BERTHELOT, J., infirmant le jugement de C. S., Québec, 5 décembre 1862, STUART, J., qui avait jugé que la signature du connaissement, avant l'exécution de la saisie revendication, ayant fait disparaître la cause de l'action, le maître du navire ne pouvait être condamné aux dépens, 13 D. T. B. C., p. 321 ; 7 J., p. 229 ; 11 R. J. R. Q., p. 351, et 20 R. J. R. Q., p. 263) Le juge AYLWIN était d'opinion de confirmer le jugement de la cour de première instance.

" REVENDICATION :—*Vide* VENTE.

SCELLE :—*Vide* COMPÉTENCE

" :— " DÉPENS.

SEPARATION DE BIENS :—*Vide* FEMME MARIÉE.

" " :— " " SÉPARÉE DE BIENS.

SEQUESTRE. Le juge en chambre a juridiction pour nommer un séquestre à un immeuble saisi et dont la vente a été arrêtée par une opposition. Arts 645 et 876 C. P. C. (*Senécal et al.* vs *Vienne*, C. S. en chambre, Montréal, 27 septembre 1870, TORRANCE, J., 14 J., p. 335, et 20 R. J. R. Q., p. 242)

SERVITUDE :—*Vide* COMPÉTENCE.

" :— " COUPE DE BOIS.

SHERIF :—*Vide* DÉCRET.

SOCIÉTÉ EN NOM COLLECTIF :—*Vide* TIERCE OPPOSITION.

SUBPŒNA :—*Vide* ASSIGNATION DES TÉMOINS.

SUBSTITUTION. Dans les donations entre-vifs l'acte reçoit sa perfection au moment où il est fait, et il faut que le donateur ait alors la capacité de donner et le donataire la capacité de recevoir. Dans les testaments, la capacité du testateur se

considère au temps de son testament, et la capacité de recevoir par testament se considère au temps du décès du testateur; mais lorsqu'il y a substitution, la capacité de recevoir par l'appelé se considère au temps de l'ouverture de la substitution en sa faveur. Sous l'ancien droit français qui était en vigueur en ce pays avant la passation du statut impérial de 1774, 14 Geo. 3, ch. 83, les bâtards adultérins et incestueux étaient capables de donations et legs d'aliments, mais ils étaient incapables de toute autre donation. Par ce statut impérial, l'incapacité de donner fut enlevée quant au testateur, et par le statut provincial de 1801, 41 Geo. 3, ch. 4, les incapacités de la part des bâtards adultérins de recevoir par testament furent aussi enlevées. D'après ces principes, une disposition testamentaire, contenue dans un testament fait en 1789, par laquelle le testateur donne ses biens à son fils légitime et le grève de substitution en faveur de son fils naturel, bâtard adultérin, doit avoir son effet en faveur de ce dernier, si la substitution ne s'est ouverte par le décès du fils légitime, en faveur du bâtard adultérin, qu'après la passation du statut de 1801, qui a enlevé toute incapacité, de la part des bâtards adultérins, de recevoir par testament, la capacité de recevoir par l'appelé à une substitution devant se considérer au temps de l'ouverture de la substitution. (*Hamilton et al.* et *Plenderleath*, Cour d'Appel, Québec, mars 1845, BOWEN, J., PANET, J., BÉDARD, J., et GAIRDNER, J., confirmant le jugement de la C. B. R., 10 octobre 1839, PYKE, J., ROLLAND, J , et GALE, J., 2 Rev. de Lég., p. 1; 2 R. J. R. Q., p. 126, et 20 R. J. R. Q., p. 124)

SUBSTITUTION. Par acte de donation entre-vifs, Marie donne un immeuble à son fils François, à la charge de substitution exprimée dans les termes suivants: " La donatrice désirant conserver aux enfants à naître en légitime mariage du donataire seulement, la propriété pleine et entière de l'immeuble ci-dessus désigné, sans l'étendre à un degré plus éloigné, veut et entend que cet immeuble ci-dessus donné en jouissance au donataire demeure substitué, comme elle le substitue par les présentes auxdits enfants à naître en légitime mariage du donataire seulement, auxquels elle donne la propriété dudit immeuble; et, dans le cas de mort du donataire sans enfant, la jouissance et l'usufruit de l'immeuble à lui présentement donné seront réversibles à ses frères et sœurs, ou à chacun d'eux, pour, par eux, en jouir, leur vie durant, et si, au décès du donataire sans enfant, tous ses frères et sœurs étaient décédés, la propriété dudit immeuble retournera et appartiendra à leurs enfants nés et à naître en légitime mariage, pour être partagée par souche." François avait deux sœurs, Julie et Josephte, et un frère Jean-Baptiste. Julie mourut avant lui sans laisser d'enfant. Jean-Baptiste et Josephte moururent aussi avant lui, mais laissèrent des enfants. Joseph, fils de Jean-Baptiste, mourut aussi avant François, son oncle, laissant des enfants. Les enfants de Joseph, fils de Jean-Baptiste, frère du donataire, poursuivirent Beaudry, comme détenteur de l'immeuble ainsi donné, alléguant que cet immeuble est devenu, à la mort de François, la propriété, par égale part, des enfants de Jean-Baptiste et de Josephte, et ils réclamaient leur part dans cet immeuble, par droit de représentation de leur père. Le défendeur a plaidé que les défenderesses ne représentaient pas leur père dans les biens donnés; mais que sa part était échue, par droit d'accroissement, aux frères et sœurs de leur père. Les demanderesses, par leur réponse

spéciale, ont invoqué la donation, prétendant qu'elles étaient appelées à la disposition. Les juges BERTHELOT et TORRANCE, qui ont rendu le jugement de la Cour confirmant le jugement de la Cour de première instance, MONK, J., ont jugé que les demanderesses ne pouvaient pas ainsi, par leur réponse spéciale, réussir sur leur action, en invoquant la donation, comme leur titre direct et immédiat, lorsque, par leur déclaration, elles n'avaient réclamé que par représentation de leur père décédé; que, dans un cas, c'était un droit qui leur résultait de la loi, et, dans l'autre, leur droit résultait de la disposition de la donation en leur faveur. La cour a jugé que, dans les expressions et les termes ci-dessus, il ne paraissait pas que la donatrice ait voulu exprimer, ainsi que les demanderesses le prétendaient, que les biens donnés fussent déférés suivant l'ordre des successions légitimes, et que l'interprétation de sa volonté devait être faite conformément à l'article 937 C. C., et que les demanderesses n'étaient pas appelées directement à recueillir en vertu de la substitution créée par la donation, et qu'elles ne pouvaient non plus réclamer par représentation de leur père, et que le bien donné était, au décès de François, passé en propriété aux enfants survivants de ses frères et sœurs, sans y comprendre leurs petits-enfants, pour être partagé entre eux par souche. Le juge MONDELET exprima, lui, l'opinion que l'intention de la donatrice paraissait être que ses biens fussent transmis suivant l'ordre de la succession, ce qui donnait aux demanderesses le droit de représentation. Art. 937 C. C. (*Castonguay et al.* vs *Beaudry*, C. S. R., Montréal, 31 mai 1869, MONDELET, J. (*dissident*), BERTHELOT, J., et TORRANCE, J., confirmant le jugement de C. S., Montréal, MONK, J., 1 R. L., p. 93, et 20 R. J. R. Q., p. 182)

SUBSTITUTION :—*Vide* TESTAMENT.

SUCCESSION :—*Vide* CONFUSION.

" :— " RENONCIATION A SUCCESSION.

SURINTENDANT SPECIAL. Un rapport fait par un surintendant spécial nommé pour régler des travaux, dans les termes suivants: "qu'il ne se croit pas en droit de faire aucune ordonnance à ce sujet," doit être considéré comme un refus d'agir de sa part, vu qu'il ne se conforme pas aux prescriptions de la sec. 45 du ch. 24 des S. R. B. C. de 1861, intitulé: "Acte concernant les municipalités et les chemins dans le Bas-Canada," qui dit que "Si le surintendant spécial considère que tel ouvrage ne doit pas être fait, il fera un rapport spécifiant les motifs de son opinion; mais, s'il est d'avis que l'ouvrage doit être fait, il dressera un procès-verbal ou rapport en conséquence." L'homologation par le conseil local d'un rapport fait dans les termes ci-dessus mentionnés, n'est d'aucune valeur quelconque, et ne peut donner droit à un appel au conseil de comté, sous les dispositions de la sec. 66 dudit statut; et, sur un tel appel, le conseil de comté ne peut, par résolution, régler les travaux d'un chemin; ses pouvoirs comme ceux du conseil local se bornant à rejeter, confirmer ou amender un procès-verbal fait par un surintendant spécial; les conseils municipaux n'ayant pas, sous l'acte concernant les municipalités le droit de prendre l'initiative et de dresser un procès-verbal au refus du surintendant d'en faire un. (*Lami* vs *Rabouin*, C. S., Trois-Rivières, 15 avril 1870, POLETTE, J., 1 R. L., p. 687, et 20 R. J. R. Q., p. 433)

SYNDIC A BANQUEROUTE :—*Vide* VENTE D'IMMEUBLE PAR UN SYNDIC A BANQUEROUTE.

SYNODE DE MONTREAL :—*Vide* QUO WARRANTO.

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TARIF :—*Vide* ASSIGNATION DES TÉMOINS.
TAXATION DES MEMOIRES DE FRAIS :—*Vide* DÉPENS.
TAXE :—*Vide* CORPORATION MUNICIPALE.
" DE FRAIS :—*Vide* REVISION.
" MUNICIPALES :—*Vide* VENTE DE PROPRIÉTÉ POUR TAXES MUNICIPALES.
TÉMOIN :—*Vide* ACTE AUTHENTIQUE.
" :— " ASSIGNATION DES TÉMOINS.
" :— " ENQUÊTE.
" :— " PREUVE.
" :— " " EN MATIÈRE CRIMINELLE.
TERRES PUBLIQUES :—*Vide* MANDAMUS.
" DE LA COURONNE :—*Vide* BOIS SUR LES TERRES PUBLIQUES.
TESTAMENT. "Qu'il soit écrit et signé par le testateur," telles sont les deux conditions indispensables que requiert, au point de vue de la forme, pour la validité du testament olographe, l'art. 289 de la Coutume de Paris, dont l'une des dispositions se lit ainsi qu'il suit : " Pour réputer un testament solennel est requis qu'il soit écrit et signé du testateur." La signature du testateur doit être apposée à la fin de l'acte. Si l'écrit ne porte pas de signature finale, il y a tout lieu de présumer qu'il n'est que le simple projet d'un testament. (*Caldwell* et *Procureur Général*, Cour d'appel, Québec, 30 juillet 1828, confirmant le jugement de la C. B. R., Québec, Stuart's Rép., p. 284, et 20 R. J. R. Q., p. 64)
" Les diverses formes de testament établies en Canada par le statut impérial de 1774, 14 George 3, ch. 83, ont été celles qui, en Angleterre, sont reconnues avoir pour effet d'opérer une translation et une disposition suffisantes des biens du testateur. Ces formes ont été introduites en cette colonie pour l'avantage de ceux des sujets du roi qui, s'y étant établis, ignoraient les formes prescrites par les lois françaises, et dans le but de leur rendre plus aisée la disposition de leur biens et de les autoriser à les léguer par testament en Canada aussi facilement et d'une manière aussi efficace qu'ils l'eussent fait en Angleterre. On ne peut certainement pas inférer de ce statut que la forme de testament capable seulement d'opérer un legs de meubles ait un effet plus étendu en Canada qu'en Angleterre, ou qu'elle puisse opérer un legs d'immeubles en Canada, lorsque par les lois du pays elle est jugée insuffisante pour cet objet. Les termes de la sec. 10 de ce statut sont clairs et formels. Cette section exprime évidemment que toute personne désireuse de disposer de ses immeubles en Canada, par un testament suivant la forme anglaise, doit suivre toutes les formalités que requiert cette forme pour qu'un tel testament opère un legs d'immeubles en Angleterre ; la même chose doit se faire pour les biens meubles. Ce statut ne signifie pas que les formes reconnues par les lois des deux pays puissent s'amalgamer de telle sorte qu'une personne adopte en partie la forme de testament reconnue par les lois de l'un pour donner effet à une forme insuffisante sous l'empire des lois de l'autre, car ce serait adopter une forme non reconnue par les lois des deux. La distinction est suffisamment marquée, on doit suivre en entier les formalités requises par les formes de l'un ou de l'autre pays, et la forme adoptée doit être efficace suivant la loi du pays où on l'a prise ; les formes de l'un des deux pays sont introduites dans l'autre, et les

formes en vigueur dans celui-ci sont confirmées de manière à former deux modes distincts de translation des biens immeubles par testament. (*Caldwell* et *Procureur Général*, Cour d'appel, Québec, 30 juillet 1828, confirmant le jugement de la C. B. R., Québec, Stuart's Rep., p. 327; 1 R. J. R. Q., p. 284, et 20 R. J. R. Q., p. 63)

TESTAMENT. Le testament, qui a été reçu par un notaire et deux témoins, mais qui, à cause de l'état comateux dans lequel est tombé le testateur au moment où le notaire se disposait à le lui relire, ne lui a été relu que le lendemain de sa confection, est nul comme testament solennel, mais valide comme testament suivant la forme anglaise. (*Ruiter* et *May et al.*, C. B. R. en appel, Montréal, 20 janvier 1825, SEWELL, J., RICHARDSON, J., COLTMAN, J., SMITH, J., et HALF, J., confirmant le jugement de C. B. R., Montréal, 19 octobre 1824, REID, J., FOUCHER, J., et PYKE, J., 5 R. J. R. Q., p. 256, et 20 R. J. R. Q., p. 55)

" D'après l'interprétation à donner aux dispositions de la sec. 10 du ch. 83 des statuts impériaux de 1774, 14 Geo. 3, un testament disposant de biens meubles ou immeubles en Canada est valide s'il a été exécuté conformément aux lois en vigueur en ce pays, lesquelles exigent la même forme pour un testament disposant de biens immeubles et pour un testament disposant de biens meubles; et un testament disposant de biens meubles en Canada est valable si, suivant les lois anglaises, il est suffisant pour disposer de biens meubles; mais un testament disposant de biens immeubles en Canada, s'il n'a été exécuté conformément à la loi en vigueur en ce pays, est invalide, à moins qu'il n'ait été dressé suivant la loi anglaise. Cette section 10 contient les mots suivants: "Dressé suivant les lois du Canada, ou suivant les formes prescrites par les lois d'Angleterre." La loi anglaise ne prescrit aucune forme pour le testament disposant de biens meubles; mais, pour qu'un testament disposant de biens immeubles soit valide, elle exige qu'il soit exécuté suivant des formes déterminées. C'est à ces formes que renvoie le statut lorsqu'il parle d'un testament disposant d'immeubles, *dressé suivant les formes prescrites par les lois d'Angleterre*, et le terme *dressé* comprend la confection, la souscription et l'attestation de la manière indiquée par le statut des Fraudes de 1676, 29 Charles 2, ch. 3. L'Acte provincial de 1801, 41 Geo. 3, ch. 4, intitulé: "Acte pour expliquer et amender la loi concernant les testaments et ordonnances de dernière volonté," n'a pas eu pour objet de modifier et n'a pas modifié la loi concernant la forme des testaments en Canada. Ce statut, en se servant dans sa section première des mots *léguer et disposer* et *quelle que soit la tenure desdits immeubles*, et en faisant mention des legs par testament aux gens de mainmorte, démontre que la Législature Canadienne a reconnu que le statut impérial de 1774, 14 George 3, ch. 83, avait trait aux legs d'immeubles, ainsi techniquement appelés dans les lois d'Angleterre. Il suit de là qu'un testament disposant d'immeubles, écrit en entier de la main du testateur, ce dernier ayant inclus son nom dans le testament sans cependant apposer sa signature à la fin des dispositions qu'il contenait, quoique olographe, n'a pas été exécuté en conformité de l'ancien droit français qui est la loi du Canada et qui exige que le testateur appose sa signature à la fin de son testament, et est manifestement nul comme legs d'immeubles fait suivant les formes prescrites par les lois anglaises. (*Meiklejohn*, tuteur, etc., et *Procureur*

Général du Bas-Canada et al., Conseil Privé, 21 juin 1834, confirmant le jugement de la Cour d'Appel, Québec, 30 juillet 1828, qui avait confirmé le jugement de la C. B. R., Québec, Stuart's Rep., pp. 327 et 581; 2 Knapp's Rep., p. 328; 1 R. J. R. Q., pp. 284 et 291, et 20 R. J. R. Q., p. 64)

TESTAMENT. Un testament, dûment exécuté devant trois témoins, peut être modifié en ses différents legs par des chèques signés en présence de deux témoins par le testateur pendant sa dernière maladie et laissés entre les mains de son secrétaire particulier pour être remis "comme donations à cause de mort" aux parties à l'ordre desquelles ces chèques ont été faits; et la vérification du mémorandum des legs faits au moyen desdits chèques, mémorandum écrit par le secrétaire particulier en présence des membres de la famille du testateur, à la demande de ce dernier qui, après lecture, l'a approuvé, est suffisante pour donner droit aux légataires de se faire adjuger les sommes ainsi léguées sans qu'il y ait vérification desdits chèques. (*Colville et al.* et *Flanagan*, C. B. R. en appel, Montréal, 1er mars 1864, DUVAL, J. en C., MEREDITH, J., MONDELET, J., BADGLEY, J., confirmant le jugement de C. S., Montréal, 22 septembre 1862, MONK, J., 14 D. T. B. C., p. 328; 8 J., p. 225; 13 R. J. R. Q., p. 56, et 20 R. J. R. Q., p. 50)

" L'épouse survivante qui n'est pas héritière de son mari, est sans intérêt à attaquer le dernier testament de ce dernier, si, par un testament précédent qu'elle n'attaque pas, elle n'est pas légataire. (*Raiche* vs *Alie*, C. S., Sorel, 28 novembre 1869, LORANGER, J., 1 R. L., p. 77, et 20 R. J. R. Q., p. 297)

" La femme convaincue du meurtre de son mari, perd par le fait de sa conviction le legs universel à elle fait par le testament de son époux. (*Gauthier* vs *Joutras*, ès-qualité, C S., Sorel, 31 mars 1869, LORANGER, J., 1 R. L. p. 473; 2 La Thémis, p. 82, et 20 R. J. R. Q., p. 359)

" L'article 289 de la Coutume de Paris était en ces termes: "Pour réputer un testament solennel, il est nécessaire qu'il soit écrit et signé du testateur; ou qu'il soit passé pardevant deux notaires, ou pardevant le curé de la paroisse du testateur, ou son vicaire général, et un notaire; ou dudit curé ou vicaire, et de trois témoins; ou d'un notaire et deux témoins: iceux témoins idoines, suffisants, mâles, et âgés de vingt ans accomplis, et non légataires: et qu'il ait été dicté et nommé par le testateur auxdits notaires, curé ou vicaire général, et depuis à lui relu en la présence d'iceux notaires, curé ou vicaire général et témoins, et qu'il soit fait mention audit testament, qu'il a été ainsi dicté, nommé et relu: et qu'il soit signé par ledit testateur, et par les témoins; ou que mention soit faite de la cause pour laquelle ils n'ont pu signer." Sous les dispositions de cet article, avant le statut impérial de 1774, 14 George 3, ch. 83, les testaments pouvaient être passés: 1° pardevant deux notaires ou pardevant le curé de la paroisse du testateur ou son vicaire général ou un notaire; 2° pardevant un notaire et deux témoins ou le curé ou vicaire et trois témoins; et 3° en forme olographe, c'est-à-dire écrit et signé du testateur sans nécessité des témoins. En 1774 fut passé le statut impérial 14 George 3, ch. 83, intitulé: "Acte qui règle plus solidement le gouvernement de la province de Québec dans l'Amérique Septentrionale." La section 10 de ce statut contient les dispositions suivantes: "Il sera et pourra être loisible à toute et chaque personne, propriétaire de tous immeubles,

meubles ou intérêts, dans ladite province, qui aura droit d'aliéner lesdits immeubles, meubles ou intérêts, pendant sa vie, par vente, donation, ou autrement, de les tester et léguer à sa mort par testament et acte de dernière volonté, nonobstant toutes lois, usages et coutumes à ce contraires, qui ont prévalu, ou qui prévalent présentement en ladite province; soit que tel testament soit dressé suivant les lois du Canada, ou suivant les formes prescrites par les lois d'Angleterre." Comme on le voit, ces dispositions introduisirent dans nos lois, les testaments faits suivant les formes prescrites par les lois d'Angleterre. Après la passation du statut impérial de 1774, et avant la mise en force du code civil, le testament fait apparemment sous une forme et nul comme tel, pouvait être valide comme fait sous une autre forme, s'il contenait tout ce qu'exige cette dernière. Ainsi, si le testateur entendait faire un testament solennel en forme authentique, sous les dispositions du droit français et si, de fait, il en faisait un nul suivant cette forme, mais bon sous les dispositions du droit anglais, ce testament était valide. Les principes du droit quant aux documents testamentaires varient beaucoup suivant l'état de perfection auquel sont arrivés ces documents. La présomption de droit en effet est contre tout document testamentaire non-actuellement exécuté par le testateur ou apparaissant à sa face comme n'ayant pas été exécuté tel que le testateur entendait le faire. Mais si le document est complet sous tous autres rapports, cette présomption est légère et faible et peut être comparativement aisément détruite. Car, dans ce cas, il n'est pas nécessaire de prouver l'intention; c'est-à-dire que le tribunal présumera que les intentions du testateur étaient telles qu'exprimées sur le papier, s'il est établi, d'une manière suffisante, que son inexécution peut être légitimement attribuée à aucune autre cause et non à l'abandon des intentions du testateur ainsi exprimées. Mais lorsqu'un document n'est ni final ni exécuté (surtout lorsqu'il n'est que commencé et ne contient que quelques clauses et legs), non seulement son inexécution doit être expliquée comme susdit, mais il doit être prouvé (car le tribunal ne le présumera pas) qu'il exprime les intentions du testateur afin de repousser la présomption légale contre sa validité. Il doit être constaté clairement après une juste considération de tous les faits et circonstances que le défunt en était arrivé à cet égard à une intention finale pour ce qu'il a fait; et ainsi, quoique le document soit imparfait sur cette constatation, le tribunal ne rendra pas sans effet les désirs et les intentions réelles du testateur quant aux biens qu'il entend donner, mais, au contraire, il leur donnera effet, en ordonnant que ce document soit admis à la vérification. Si l'instrument est en voie d'exécution seulement et non terminé quant au corps de l'instrument, la présomption légale est, sans doute, que si le défunt n'avait pas été empêché de le finir, il eut procédé à pourvoir à ses enfants dans une partie subséquente de l'instrument. Si un testateur décède pendant que l'instrument est à s'exécuter, on ne peut soutenir comme présomption légale que ce qui est contenu dans la partie déjà exécutée doit avoir son effet. La règle est que si le tribunal se satisfait, qu'en donnant effet au document non terminé, il donne effet à la volonté du testateur, il doit être déclaré valide, mais qu'au contraire, si en l'approuvant, il considère qu'il ne donnera pas effet à la volonté du testateur, il doit le désapprouver. Lorsqu'un testateur décède

pendant qu'on est à faire son testament, ce qui est écrit après son décès doit être déclaré nul; la mort termine le document et on ne peut rien y ajouter. Lorsqu'un testateur a exprimé au notaire, chargé de faire son testament et en présence de deux témoins idoines et spécialement requis à cette fin, sa volonté de faire un legs particulier à une personne désignée et de donner le reste de ses biens à son enfant, et décède après que la disposition contenant le legs particulier seulement a été écrite par le notaire, mais avant que la disposition, contenant le legs universel à l'enfant, soit écrite, le tribunal doit déclarer valide la partie du testament ainsi faite, et donner effet au legs, vu que l'intendu testateur n'est pas contestée, et que la non-exécution du testament complet est due au décès du testateur et non à un changement d'intention de sa part. Il n'y eut jamais, dans la province de Québec, de tribunal exerçant une juridiction spéciale quant aux testaments. La pratique basée sur la convenance évidente ou la nécessité paraît s'être établie dans la province, après la cession du pays à l'Angleterre, d'enregistrer, ou comme on dit un peu inexactement de prouver les testaments faits suivant les lois anglaises devant un juge des tribunaux civils. Cette pratique, dont l'effet légal paraît avoir été douté, fut continuée jusqu'en 1801, et alors s'est passé le statut du Bas-Canada de 1801, 41 Geo. 3, ch. 4, intitulé : " Acte pour expliquer et amender la loi concernant les Testaments et Ordonnances de dernière volonté ", dont la section 2 contient les dispositions suivantes: "Comme il s'est élevé des doutes sur la manière actuelle de prouver les testaments faits et dressés suivant la forme anglaise, devant un ou plusieurs des Juges des Cours de juridiction civile en cette province, qu'il soit de plus statué que telle preuve vaudra et aura force de la même manière que si elle était faite devant la Cour de Probate." Ce langage, à première vue, paraît avoir introduit, dans le droit canadien, la loi d'Angleterre, quant à l'effet conclusif de la preuve dûment faite d'un testament, et lorsque, sur la demande de vérification d'un testament, l'héritier a soulevé la question de sa validité, et qu'on a examiné des témoins et plaidé, et que la preuve en a été accordée, la même question ne peut se soulever de nouveau devant un autre tribunal, du moins entre les mêmes parties, mais que la vérification ou preuve du testament opérera comme fin de non-recevoir à toute autre action concernant sa validité et soulevant la même question. Cependant la pratique contraire paraît avoir été suivie par les tribunaux canadiens. Il est bien douteux que, sur une demande de vérification d'un testament, on puisse, dans la province, faire une contestation au mérite, soulevant la question d'insanité ou d'influence indue. La sec. 23 du ch. 78 des S. R. B. C. de 1861, intitulé: " Acte concernant la Cour Supérieure," contient les dispositions suivantes: "Tout juge de la Cour Supérieure, en tout endroit où ladite cour ou la cour de circuit doit être tenue, tant en cour que hors de cour, pendant le terme ou hors de terme ou durant la vacance, et tout protonotaire de la cour supérieure à l'endroit où il tient son bureau, hors de cour, mais durant le terme ou hors du terme,—auront et pourront exercer dans et pour le district dans lequel tel endroit comme susdit se trouve, le même pouvoir et la même autorité dont sont alors revêtus la cour supérieure et ses juges pour la vérification des testaments, pour l'élection et nomination de tuteurs et curateurs, tant

sous la loi générale que sous les dispositions du chapitre quatre-vingt-sept de ces statuts refondus, concernant les débiteurs insolvables, ou sous tout autre acte, pour recevoir les conseils et avis de parents et amis dans les cas où la loi le requiert, pour les clôtures d'inventaires, attestation de comptes, insinuations, apposition et levée de scellés, émancipation des mineurs, homologation ou refus d'homologation des procédures adoptées aux assemblées pour avis de parents, convoquées et tenues par un notaire ou tenues en en sa présence, et pour tous autres actes de la même nature exigeant diligence; et les procédures en pareil cas formeront parties des archives de la cour supérieure à l'endroit où elles ont lieu, ou de la cour de circuit de tel endroit, si la cour supérieure n'y est pas tenue: 2. Mais les nominations et ordres faits par un protonotaire en vertu de cette section, ou faits en vertu de la même section par tout juge hors de cour, pourront être mis de côté par tout juge de ladite cour siégeant dans le même district, en cour et durant le terme, en la même manière et en vertu des dispositions de la loi d'après lesquelles toutes nominations et ordres faits par un ou plusieurs juges hors de cour, dans les matières exigeant diligence, peuvent être mis de côté par la cour supérieure." Le Code Civil du Bas-Canada qui est devenu en force en 1866, contient les dispositions suivantes contenues dans les articles 856, 857 et 858: "856: Les minutes et les copies légalement certifiées des testaments faits suivant la forme authentique font preuve de la même manière que les autres écrits authentiques. 857: Le testament olographe et celui fait suivant la forme dérivée de la loi d'Angleterre sont présentés pour vérification au tribunal ayant juridiction supérieure de première instance dans le district où le défunt avait son domicile, et, à défaut de domicile, dans celui où il est décédé, ou à l'un des juges de ce tribunal, ou au protonotaire du district. Le tribunal, le juge ou le protonotaire reçoit les déclarations par écrit et sous serment de témoins compétents à rendre témoignage, lesquelles demeurent annexées à l'original du testament, ainsi que le jugement, s'il a été rendu hors de cour, ou une copie certifiée, s'il a été rendu par le tribunal. Il peut ensuite être délivré aux intéressés des copies certifiées du testament, de la preuve et du jugement, lesquelles sont authentiques, et font donner effet au testament, jusqu'à ce qu'il soit infirmé sur contestation. Si le testament se trouve déposé en original chez un notaire, le tribunal, le juge ou le protonotaire se fait remettre cet original. 858: Il n'est pas nécessaire que l'héritier du défunt soit appelé à la vérification ainsi faite d'un testament, à moins qu'il n'en soit ainsi ordonné dans des cas particuliers. L'autorité qui procède à cette vérification prend connaissance de tout ce qui concerne le testament. La vérification ainsi faite d'un testament n'en empêche pas la contestation par ceux qui y ont intérêt." Dans le quatrième rapport des commissaires qui ont préparé le code civil, on lit ce qui suit à la page 178: "La section troisième traite de la preuve des testaments, et aussi de la vérification préliminaire, devant le juge, de ceux qui ne sont pas faits en la forme authentique. Un testament concerne souvent plusieurs parties, par toutes lesquelles il serait difficile de le faire reconnaître, quoique ces parties et même les tiers aient intérêt à ce que sa validité subisse de suite une première épreuve. La procédure à cet effet est bien connue en Angleterre et en ce pays sous le terme de *probate*; elle

est surtout usitée en Angleterre où les testaments sous une forme qui corresponde à notre forme authentique n'ont pas lieu. L'on retrouve, tant dans l'ancien droit français que dans la pratique ancienne en ce pays, des traces d'une pareille vérification quant au testament olographe. Toutefois, il n'est pas nécessaire de pousser plus loin les recherches à cet égard, la vérification du testament olographe et celle du testament suivant la forme anglaise ayant uniformément eu lieu de la même manière, qui est celle de la forme commune de vérification adoptée en Angleterre, où il y a aussi une vérification plus solennelle où les parties intéressées sont appelées et par laquelle elles sont liées. Cette dernière vérification n'est pas usitée en ce pays, à moins qu'on ne la compare à une action poursuivie contradictoirement devant le tribunal même. La vérification a lieu ici devant le juge, hors du tribunal. Notre statut provincial de 1801 se contente de dire qu'elle continuera de se faire comme par le pas-é." Le mot contestation dans le sens de ce rapport et dans le code, ne paraît pas signifier, comme en Angleterre, une poursuite devant la cour de *probate* avant que la vérification soit accordée, mais dans quelqu'autre poursuite, une poursuite devant un tribunal civil où la validité du testament serait attaquée Ainsi, par la pratique et l'usage non-interrompue des tribunaux canadiens depuis 1801, la loi a reçu une interprétation qui n'attache pas à la vérification ou preuve des testaments le caractère conclusif et obligatoire qu'elle a en Angleterre, et conformément à cette interprétation, avant le code, il était permis aux parties de contester la validité d'un testament prouvé comme défense à une action portée par un légataire pour le paiement de son legs. Ainsi, un légataire qui avait demandé la vérification et preuve d'un document contenant un legs particulier en sa faveur, mais non-terminé quant à d'autres dispositions, comme testament du testateur qui était décédé pendant son exécution, peut, après la contestation soulevant la validité de cette disposition, faite par l'héritier du testateur sur la demande de vérification, et vérification accordée, être soumis à la même contestation sur une demande de paiement de ce legs. Le statut qui a introduit dans la colonie le droit anglais quant aux testaments, doit être considéré comme y ayant introduit avec lui tous ses incidents ; et par conséquent, l'admissibilité de la preuve testimoniale, sans laquelle le nouvelle loi serait inutile et sans effet. Ainsi la preuve d'un testament, commencé par un notaire et non terminé, n'est pas soumise aux dispositions de l'article 1233 qui, pour permettre la preuve testimoniale, exige un commencement de preuve par écrit. On doit, dans ce cas, suivre les règles de la preuve du droit anglais. (*Migneault* et *Malo*, Conseil Privé, 3 février 1872, infirmant le jugement de C. B. R. en appel, Montréal, 9 septembre 1869, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et LORANGER, J., qui infirmait le jugement de C. S. R., Montréal, 28 mars 1868, MONDELET, J., dissident, BERTHELOT, J., et MONK, J., qui confirmait le jugement de C. S., Montréal, 31 mai 1867, BERTHELOT, J., 14 J., p. 141 ; 16 J., p. 288 ; 2 R. L., p. 186 ; 3 R. L., p. 606 ; 2 R. C., p. p. 229 ; 8 Moore's P. C. Reports, N. S., p. 347, et 20 R. J. R. Q., p. 47)

TESTAMENT. Les frais de vérification d'un testament à laquelle l'héritier s'est opposé, peuvent être recouvrés de cet héritier par le légataire particulier qui a demandé la vérification dans une demande, par lui faite, pour le paiement de son legs, et ce,

quoique, par le jugement ordonnant la vérification, l'héritier ait déjà été condamné à payer ces frais. (*Migneault* et *Malo*, Conseil Privé, 3 février 1872, infirmant le jugement de C. B. R. en appel, Montréal, 9 septembre 1869, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et LORANGER, J., qui infirmait le jugement de C. S. R., Montréal, 28 mars 1868, MONDELET, J. (*dissident*), BERTHELOT, J., et MONK, J., qui confirmait le jugement de C. S., Montréal, 31 mai 1867, BERTHELOT, J., 14 J., p. 141; 16 J., p. 288; 2 R. L., p 186; 3 R. L., p. 606; 2 R. C., p. 229; 8 Moore's P. C. Reports, N. S., p. 347, et 20 R. J. R. Q., p 47)

TESTAMENT. Le testament olographe et la souscription étant de main privée, il ne fait foi que lorsqu'il a été vérifié ou prouvé devant le juge et que les témoins ont reconnu leur signature. (*Malo et vir* et *Migneault*, C. B. R. en appel, Montréal, 9 septembre 1869, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et LORANGER, J., qui infirmait le jugement de C. S. R., Montréal, 28 mars 1868, MONDELET, J. (*dissident*), BERTHELOT, J., et MONK, J., qui confirmait le jugement de C. S., Montréal, 31 mai 1867, BERTHELOT, J., 14 J., p. 141; 16 J., p. 288; 2 R. L., p. 186; 3 R. L., p. 606; 2 R. C., p. 229; 8 Moore's P. C. Reports, N. S., p. 347, et 20 R. J. R. Q., p. 47)

" Par l'ancien droit du Bas-Canada, au temps de la conquête, en 1759, le legs fait par un père à son enfant bâtard adultérin était illégal, excepté quant à des aliments, le testateur étant déclaré incapable de léguer et le légataire incapable de recevoir. Par le statut impérial de 1774, 14 Geo. III, ch. 83, sec. 10, l'incapacité du testateur fut enlevée. Par le statut du Bas-Canada de 1801, 41 Geo. III, ch. 4, l'incapacité du légataire fut enlevée. Ce dernier statut n'est pas rétroactif. Par l'article 838 C. C., la capacité de recevoir par testament, dans le cas de substitution, se considère au temps où le droit est ouvert. Ainsi, un legs fait en 1789, après le statut de 1774, par un père décédé en 1799, avant le statut de 1801, à son fils légitime décédé en 1835, après la mise en vigueur de ce dernier statut, avec substitution en faveur d'un enfant bâtard adultérin, est légal, vu qu'en 1835, lors du décès du fils légitime et de l'ouverture de la substitution, l'incapacité du testateur avait été enlevée, lors du testament, par le statut de 1774, et l'incapacité du légataire avait été enlevée par le statut de 1801. (*King* vs *Filiatrault et al.*, et *Tunstall et al.*, C. S., Montréal, 28 février 1870, TORRANCE, J., 14 J., p. 197, et 20 R. J. R. Q, p. 119)

" :—*Vide* LEGS.

" :— " SUBSTITUTION.

" NUNCUPATIF. La sec. 19 du ch. 3 des statuts impériaux de 1677, 29 Charles II, intitulé: " Acte pour la prévention des fraudes et des parjures," se lisait comme suit: " Pour la prévention des pratiques frauduleuses dans la confection des testaments nuncupatifs, qui ont été l'occasion de beaucoup de parjures, il est décrété qu'aucun testament nuncupatif ne sera valide, lorsque les biens légués par ce testament excèderont la valeur de trente livres, et s'il n'est pas prouvé par le serment de trois témoins au moins qui étaient présents à sa confection, ni à moins qu'il ne soit prouvé que le testateur, au temps où il l'a fait, a requis la personne présente ou quelqu'un d'entre les témoins, que tel était son testament, ou à cet effet, ni à moins que tel testament nuncupatif ne soit fait lors de la dernière maladie du défunt et dans la maison, ou son habitation ou domicile où il ou elle a été résidant pendant l'espace de dix jours ou plus immé-

diatement avant la confection de tel testament, excepté toutefois, dans le cas où telle personne, absente de sa maison, serait surprise par la maladie et mourrait avant de retourner au lieu de son domicile." Les testaments nuncupatifs avaient cessé d'être en usage en Angleterre, et ils furent formellement abolis en 1838. Ces testaments n'étaient pas reconnus et admis dans les pays de la France soumis au droit coutumier et ils furent abolis dans les pays soumis au droit civil de la France par l'ordonnance royale de 1735. (*Malo et vir* et *Migneault*, C. B. R. en appel, Montréal, 9 septembre 1869, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et LORANGER, J., qui infirmait le jugement de C. S. R., Montréal, 28 mars 1868, MONDELET, J. (*dissident*), BERTHELOT, J., et MONK, J., qui confirmait le jugement de C. S., Montréal, 31 mai 1867, BERTHELOT, J., 14 J., p. 141; 16 J., p. 288; 2 R. L., p. 186; 3 R. L., p. 606; 2 R. C., p. 229; 8 Moore's P. C. Reports, N. S., p. 347, et 20 R. J. R. Q., p. 47)

TIERS-SAISI :—*Vide* SAISIE-ARRÊT APRÈS JUGEMENT.

" -DETENTEUR :—*Vide* ENREGISTREMENT.

TIERCE-OPPOSITION. Une société en nom collectif, composée de plusieurs membres peut former une tierce-opposition à un jugement rendu dans une cause où l'un des membres de la société était partie. (*McDonald et vir* vs *McDonald*, et *McDonald et al.*, tiers-opposants, C. S. R., Montréal, 30 octobre 1869, MONDELET, J., BERTHELOT, J., et TORRANCE, J., infirmant le jugement de C. S., Montréal, 28 avril 1868, BERTHELOT, J., 14 J., p. 307, et 20 R. J. R. Q., p. 266)

TRANSACTION. Lorsqu'est intervenu entre les parties au procès un arrangement qui a pour effet de priver frauduleusement le procureur du demandeur de ses frais, le tribunal déboutera le demandeur de son action et condamnera le défendeur en tous les dépens. (*Richards* vs *Kitchie et al.*, C. S., Québec, 5 mars 1856, STUART, J., GAUTHIER, J., et TASCHEREAU, J., 6 D. T. B. C., p. 98; 5 R. J. R. Q., p. 29, et 20 R. J. R. Q., p. 263)

" Relativement à la dette ou à la matière qui fait l'objet du litige, les parties peuvent faire l'arrangement qu'il leur plaît, mais si l'arrangement concerne la procédure et qu'il soit intervenu entre les parties à l'insu de l'un des procureurs, il n'engage en rien le procureur qui n'en a pas eu connaissance. Le procureur est le maître du procès; c'est lui qui doit le diriger, et le client ne peut, par un arrangement étranger à son procureur, intervenir dans la conduite du litige. (*O'Connell* vs *Cité de Montréal*, C. S., Montréal, 31 octobre 1859, SMITH, J., 4 J., p. 56; 10 D. T. B. C., p. 19; 8 R. J. R. Q., p. 95, et 20 R. J. R. Q., p. 264)

" Un arrangement étant intervenu entre les parties au procès, le défendeur se chargeant de payer les frais de l'action avant son rapport, le demandeur ne peut ensuite, à moins d'une convention spéciale, rapporter l'action pour recouvrer lesdits frais que le défendeur aurait négligé de payer, cet accommodement ayant eu l'effet de mettre fin à la demande du demandeur et ayant réduit son recours à la seule demande des frais lorsqu'ils auront été taxés. La demande pour distraction de dépens, faite par les conclusions de la déclaration, n'enlève pas au demandeur le droit de prendre, relativement à son action, tout arrangement honnête et qui n'a pas l'effet de priver les avocats de leurs justes honoraires. En loi, aucune distraction de dépens n'existe ni ne peut avoir lieu, sans avoir été accordée par un jugement de la cour. (*Hébert dit Lecompte* et *Fabrique de Saint-Jean*, C. B. R. en appel, Montréal, 17 septembre 1861, LAFONTAINE,

J. en C., AYLWIN, J., DUVAL, J., MEREDITH, J., et MONDELET, J., confirmant le jugement de C. S., 4 février 1861, TASCHEREAU, J., 13 D. T. B. C., p. 66; 11 R. J. R. Q., p. 264, et 20 R. J. R. Q., p. 263)

TESTAMENT. Les frais, dont distraction a été demandée dans les conclusions de la déclaration par le procureur *ad litem* du demandeur, lui seront adjugés par le tribunal, nonobstant l'arrangement par acte notarié intervenu entre les parties après le rapport de l'action, et par lequel le demandeur se désistait de son action et se chargeait d'en payer tous les frais. (*Charlebois* vs *Coulombe*, C. S., Montréal, 24 février 1863, MONK, J. A., 7 J., p. 300; 12 R. J. R. Q., p. 178, et 20 R. J. R. Q., p. 181)

" Les parties à un procès peuvent transiger et y mettre fin sans le concours de leurs procureurs *ad litem*, et ces derniers n'ont pas le droit de continuer un procès parce qu'il est demandé distraction de frais; la transaction mettant fin au mandat des procureurs et entraînant nécessairement le désistement de la demande. Art. 1918 C. C., et arts 450 et 482 C. P. C. (*La Banque de Québec* vs *Paquet*, C. S. R., Montréal, 29 janvier 1869, MONDELET, J., BERTHELOT, J., et BEAUDRY, J. A., infirmant le jugement de C. S., Sherbrooke, 26 mai 1868, SHORT, J., 13 J., p. 122: 19 R. J. R. Q., p. 168, et 20 R. J. R. Q., p. 264)

" Les parties dans une cause peuvent sans le concours de leurs avocats qui ont demandé distraction de frais, régler leurs difficultés et discontinuer la poursuite, et dans ce cas, l'avocat du demandeur qui n'a pas été payé de ses frais pour lesquels il a demandé distraction qu'il n'avait pas encore obtenue, ne peut continuer cette poursuite pour ses frais, et s'il continue ainsi cette poursuite pour ses frais, il pourra être condamné personnellement aux dépens de la contestation et de l'appel en revision. (*Lafaille* vs *Lafaille*, C. S. R., Montréal, 31 mars 1869, MONDELET, J., TORRANCE, J., et BEAUDRY, J. A., infirmant le jugement de C. S., Saint-Jean, 10 novembre 1867, 14 J., p. 262; 1 R. L., p. 90, et 20 R. J. R. Q., p. 180)

" Lorsque les parties règlent leur procès commencé, hors de cour, sans le concours des avocats qui les représentent, ces derniers ne peuvent continuer la poursuite pour leurs frais. Art. 1918 C. C. (*Castonguay* vs *Perrin et al.*, C. S., Montréal, 30 septembre 1870, TORRANCE, J., 14 J., p. 304, et 20 R. J. R. Q., p. 262)

TRANSFERT D'ACTIONS DE BANQUE: — *Vide* BANQUE DE MONTRÉAL.

TRANSPORT: — *Vide* VENTE DE CRÉANCE.

TRIBUNAUX INFERIEURS: — *Vide* ACTE DE TEMPÉRANCE DE 1864.

U

USUFRUIT: — *Vide* CONFUSION.

" : — " VENTE.

V

VAISSEAU: — *Vide* ASSURANCE MARITIME.

" NAVIGUANT A L'INTERIEUR: — *Vide* ASSURANCE MARITIME ET CONTRE L'INCENDIE D'UN VAISSEAU ENREGISTRÉ.

" NAVIGUANT A L'INTERIEUR: — *Vide* ENREGISTREMENT DES VAISSEAUX NAVIGUANT A L'INTÉRIEUR.

" NAVIGUANT A L'INTERIEUR: — *Vide* VENTE DE VAISSEAUX NAVIGUANT A L'INTÉRIEUR.

VENDEUR :—*Vide* PRIVILÈGE DU VENDEUR.
VENDITIONI EXPONAS :—*Vide* DÉCRET.
VENTE. L'acte de convention du 12 avril 1853 est de fait un acte translatif de propriété et a opéré l'aliénation ou le transport de la propriété des biens de la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique, vu que, avant et au temps de la convention, lesdits biens appartenaient exclusivement à ladite compagnie de chemin de fer du Saint-Laurent et de l'Atlantique, tandis qu'après la date et la mise à effet de cette convention et en vertu d'icelle, ces biens sont devenus la propriété d'une autre corporation distincte, savoir la compagnie du Grand-Tronc de chemin de fer du Canada. Cet acte équivaut à vente quant aux £75,000 que la compagnie du Grand-Tronc de chemin de fer s'est obligée de payer pour les actionnaires de la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique, vu que les parties à cette convention, en obligeant la compagnie du Grand-Tronc de chemin de fer du Canada à payer cette somme de £75,000 à la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique, ont admis, de fait, que les biens cédés par la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique excédaient de ce montant, en valeur, les actions de la compagnie du Grand-Tronc de chemin de fer du Canada, auxquelles les actionnaires de la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique avaient droit en vertu de cette convention; mais cette convention n'est pas équipollente à vente quant aux actions dans la compagnie du Grand-Tronc de chemin de fer du Canada, auxquelles les actionnaires de la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique avaient droit en vertu de cette convention, vu que ces actions étaient reçues en échange de leurs actions dans la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique. Cette convention n'est pas non plus équipollente à vente quant aux dettes de la compagnie de chemin de fer du Saint-Laurent et de l'Atlantique, dont s'est chargée la compagnie du Grand-Tronc de chemin de fer, vu que lesdites dettes doivent être considérées comme formant un montant qu'on doit déduire de la valeur de l'actif transféré comme capital par la compagnie du Saint-Laurent et de l'Atlantique à la compagnie du Grand-Tronc de chemin de fer du Canada, et vu que l'obligation par ladite compagnie du Grand-Tronc de chemin de fer du Canada de payer ces dettes était, aux termes de la sec. 4 du ch. 39 des Statuts du Canada de 1852, 16 Vict., une conséquence nécessaire de l'union desdites deux compagnies, union qui n'est pas considérée comme une vente par ledit statut qui a permis l'union de plusieurs compagnies, ce qui a été fait, ou la vente des propriétés d'une compagnie à une autre, ce qu'on n'a pas jugé à propos de faire. La compagnie du Grand-Tronc de chemin de fer du Canada n'étant qu'une corporation privée, et non un corps public agissant pour l'Etat, et ayant droit aux privilèges incidents aux contrats faits par l'Etat pour des fins d'utilité publique, est donc en conséquence tenue de payer au seigneur les lods et ventes sur une vente dont le prix est de £75,000. (*Kierskowski* et *Cie du Grand-Tronc de chemin de fer du Canada*, C. B. R. en appel, Montréal, 9 décembre 1859, LAFONTAINE, J. en C., AYLWIN, J. (*dissident*), DUVAL, J., MEREDITH, J., et A. LAFONTAINE, J. (*dissident*), infirmant le jugement de C. S., Montréal, 23 novembre 1857, SMITH, J. (*dissident*), MONDELET, J., et BADGLEY, J., 4 J., p. 86; 8 D. T.

B. C., p. 3; 10 D. T. B. C., p. 47; 6 R. J. R. Q., pp. 93 et 124, et 8 R. J. R. Q., p. 492). Le juge MEREDITH exprima l'opinion que la convention du 12 avril 1853 constituait une société entre les compagnies unies, mais une vente quant aux £75,000.

VENTE. Celui qui obtient une promesse de vente d'une terre de l'agent publiquement et notoirement connu d'une compagnie de terres et est par cet agent mis en possession de cette terre, ne pourra en être dépossédé par un acquéreur subséquent qui acquiert cette terre directement de la compagnie. Le premier acquéreur n'est pas obligé, dans ce cas, de produire un mandat écrit à l'agent qui lui a fait la promesse de vente. (*Dubrule* et *Lafontaine*, C. B. R. en appel, Montréal, 9 juin 1868, DUVAL, J., AYLWIN, J., CARON, J., BADGLEY, J. (*dissident*), et DRUMMOND, J., infirmant le jugement de C. S., 1 R. L., p. 709, et 20 R. J. R. Q., p. 466)

" L'acquéreur d'un immeuble hypothéqué provenant d'une succession a le droit de refuser de payer à l'usufruitier des biens de cette succession le montant d'une obligation qu'il a consentie personnellement à cet usufruitier, jusqu'à ce que ce dernier ait fait décharger l'immeuble de l'hypothèque qui le grevait, si la succession a été rendue insolvable par la faute de cet usufruitier. (*Rousselle* vs *Primeau*, C. S. R., Montréal, 30 mai 1868, MONDELET, J., BERTHELOT, J., et MONK, J., 1 R. L., p. 703, et 20 R. J. R. Q., p. 463)

" Le vendeur d'une quantité déterminée de barils d'huile de charbon, pour un prix déterminé au gallon, a rempli son obligation en livrant la quantité d'huile contenue dans quatre cents barils (l'huile étant volatile, les barils ne sont jamais pleins), et il n'est pas tenu de livrer les quatre cents barils pleins, quoique le contrat ne soit pas pour un lot déterminé, et l'acheteur qui a reçu, sans protester, un certificat de mesurage de la quantité d'huile qui se trouve dans quatre cents barils, et qui a promis d'en payer le prix, ne peut ensuite refuser d'accepter cette quantité d'huile qui ne forme pas les quatre cents barils pleins, et refuser de payer le prix de cette quantité, parce qu'on ne lui a pas livré le tout. Art. 1474 C. C. (*Rimmer et al.* vs *Ruston*, C. B. R. en appel, Montréal, 8 septembre 1870, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., infirmant le jugement de C. S. R., Montréal, 22 mai 1869, MONDELET, J., BERTHELOT, J., et BEAUDRY, J., qui confirmait le jugement de C. S., Montréal, 30 décembre 1868, MONDELET, J., 14 J., p. 325, et 20 R. J. R. Q., p. 275)

" La vente est parfaite par le seul consentement des parties, lorsqu'elle est d'un corps certain et déterminé et pour un prix fixe (art. 1472 C. C.); et, dans ce cas, l'acheteur a droit de saisir-revendiquer l'objet vendu. Lorsque des choses mobilières sont vendues au poids, au compte ou à la mesure, et non en bloc, (comme tous les houblons croissant sur une ferme, à tant la livre), la vente n'est parfaite que lorsqu'elles ont été pesées, comptées ou mesurées (art. 1474 C. C.); et, dans ce cas, l'acheteur n'a pas d'autre action que celle pour demander la livraison des effets vendus, et des dommages, en cas de refus. Dans ce dernier cas, il n'a pas l'action en revendication, mais il a droit à une saisie conservatoire des choses vendues. (*Kelly et al.* vs *Merville*, C. S. R., Montréal, 30 avril 1869, MONDELET, J., TORRANCE, J., et BEAUDRY, J., confirmant le jugement de C. S., Saint-François, 23 décembre 1867, SHORT, J., 1 R. L., p. 194, et 20 R. J. R. Q., p. 341)

VENTE :—*Vide* CORPORATION COMMERCIALE ÉTRANGÈRE.
" :— " CESSION DE BIENS VOLONTAIRE.
" :— " COMPÉTENCE.
" :— " COUPE DE BOIS.
" :— " ENREGISTREMENT.
" :— " GARANTIE DU VENDEUR.
" :— " PRESCRIPTION.
" :— " PRIVILÈGE DU VENDEUR.
" DE BOISSON SANS LICENCE :—*Vide* LICENCE D'AUBERGE.
" DE CREANCE. Le transport ou la vente d'une créance est valable, si ce transport est passé devant notaire, et est accepté pour le cessionnaire par le notaire qui reçoit l'acte, et est ensuite signifié au débiteur, par ce notaire, à la réquisititon de ce cessionnaire; cette signification ayant l'effet mentionné dans la section 11 du chapitre 39 des statuts du Canada de 1850, 13 et 14 Victoria, intitulé: "Acte pour amender et refondre l'acte qui pourvoit à l'organisation du notariat dans le Bas-Canada," qui se lit comme suit: "Les notifications, significations et protestations faites par les notaires, à la réquisition d'une partie et sans qu'elle ait accompagné les notaires ou le notaire ni signé l'acte, seront authentiques et feront preuve par elles-mêmes de leur contenu jusqu'à récusation ou désaveu par la personne (ou autres ayant droit) au nom de qui ces significations, notifications et protestations auront été faites; et nonobstant toutes lois ou décisions judiciaires à ce contraires, les notaires coutinueront de la même manière que les avocats et procureurs peuvent le faire, à signer au nom des parties requérantes et sans autre pouvoir spécial, des requêtes ou pétitions requises pour demander la convocation des assemblées de parents et amis, lorsqu'il s'agit de tutelle, curatelle, vente de biens immeubles de mineurs ou interdits, partages ou licitations, et autres semblables affaires de famille et succession." V. art. 1570, C. C. (*Perrault et vir* vs *La Banque d'Ontario*, C. B. R. en appel, Montréal, 19 novembre 1863, LAFONTAINE, J. en C., DUVAL, J., MEREDITH, J., et MONDELET, J., infirmant le jugement de C. S., Montréal, 26 décembre 1860, SMITH, J., 7 J., p. 313; 14 D. T. B. C., p. 1; 12 R. J. R. Q., p. 199, et 20 R. J. R. Q., p. 423)
" DE CREANCE. Le transport d'une créance hypothécaire enregistrée n'est pas nul par le fait que le cessionnaire ne l'a accepté ni personnellement, ni par procureur spécialement autorisé à cette fin; et l'acceptation pour le cessionnaire faite par le notaire qui reçoit l'acte de transport est valable, pourvu que le cessionnaire ratifie cette acceptation par des actes subséquents. L'enregistrement du transport, à la réquisition du cessionnaire, est une ratification suffisante de l'acceptation faite par le notaire. Le transport d'une créance enregistrée est parfait par l'acceptation du débiteur et l'enregistrement subséquent à l'acceptation, et lorsqu'il y a acceptation du débiteur, il n'est pas nécessaire de fournir à ce dernier un double du certificat d'enregistrement. Arts 1571 et 2127 C. C. (*Crébassa* vs *Crépeau*, et *Robitaille*, t.-s., C. S. R., Montréal, 28 février 1868, MONDELET, J., BERTHELOT, J., et MONK, J., confirmant le jugement de C. C., Sorel, 4 mai 1867, LORANGER, J., 1 R. L., p. 667, et 20 R. J. R. Q., p. 422)
" DE CREANCE. Le débiteur qui a accepté le transport de la dette qu'il doit, fait par son créancier, et qui s'est obligé de la payer au cessionnaire, n'est plus recevable à plaider, vis-à-vis de ce dernier, erreur quant au montant dû au cédant.

(*McDonald et al.* vs *Goyette*, et *McDonald et al.* vs *Thomas et al.*, C. S. R., Montréal, 30 novembre 1869, MONDELET, J., BERTHELOT, J., et TORRANCE, J., 14 J., p. 137; 2 R. L., p. 184, et 20 R. J. R. Q., p. 41)

VENTE DE CHOSES MOBILIERES AU POIDS ET AU COMPTE. Celui qui vend une certaine quantité de choses mobilières au poids (dans l'espèce, 59 tonnes de foin) livrables à un lieu indiqué dans les dix jours de la date de la vente, est tenu de livrer ces choses avant l'expiration du délai convenu, dans un temps raisonnable pour qu'elles puissent être pesées et comptées. Ainsi, le vendeur de 50 tonnes de foin livrables dans dix jours de la vente, ne pourra faire accepter ce foin par l'acquéreur s'il n'en a fait la livraison qu'à six heures le soir du dernier jour fixé pour cette livraison, vu qu'à cette heure l'acheteur ne pourra pas peser et recevoir cette quantité de foin dans un délai de moins d'une journée, et, dans ce cas, l'acheteur est déchargé de son obligation d'acheter. Arts 1065, 1069, 1152 et 1474 C. C. (*Franchère* et *Gordon*, C. B. R. en appel, Montréal, 8 mars 1870, CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., confirmant le jugement de C. S. R., Montréal, 29 janvier 1869, MONDELET, J., dissident, BERTHELOT, J., BEAUDRY, J., qui infirmait le jugement de C. S., Montréal, 30 octobre 1868, MONDELET, J., 14 J., p. 152; 2 R. L., p. 187, et 20 R. J. R. Q., p. 78)

" D'IMMEUBLE PAR UN SYNDIC A BANQUEROUTE. Un syndic, sous l'acte de faillite, peut accepter de l'adjudicataire d'un immeuble vendu par lui, comme syndic, une obligation donnée par cet adjudicataire et des cautions pour le prix de vente de cet immeuble, et il peut ensuite poursuivre l'adjudicataire et les cautions pour le recouvrement du montant de l'obligation, et il n'est pas obligé de procéder par folle enchère. (*Barthe* vs *Armstrong*, C. S., Sorel, 1869, LORANGER, J., 1 R. L., p. 47, et 20 R. J. R. Q., p. 291)

" DE LIQUEURS SANS LICENCE :—*Vide* CERTIORARI.

" DE MEUBLES. Un acte de vente de meubles, passé devant notaires, dans lequel ne se trouve aucune stipulation de dessaisine et saisine, cet acte mentionnant seulement que l'acheteur a mis sa marque sur deux des articles vendus qui sont restés en la possession du vendeur, doit être considéré comme frauduleux, bien qu'il y ait eu bail subséquent desdits meubles par l'acheteur au vendeur, par le motif qu'il n'y a eu aucun déplacement ou tradition légale des objets vendus; en conséquence, un créancier du vendeur, même postérieur à une telle vente, peut faire saisir et vendre lesdits meubles sur le vendeur. (*Bonacina* et *Seed*, C. B. R. en appel, Montréal, 12 octobre 1853, ROLLAND, J., PANET, J., et AYLWIN, J., confirmant le jugement de C. S., Montréal, 4 janvier 1853, SMITH, J., dissident, DAY, J., 3 D. T. B. C., p. 446, et 20 R. J. R. Q., p. 171). Le juge ROLLAND, quoique pour la confirmation du jugement, était d'opinion que l'acte de vente était valable entre les parties, sauf le recours de ceux qui ont intérêt à ce que la vente n'ait pas lieu; que, dans ce cas, le déplacement devient une formalité nécessaire, et que tous les meubles qui sont en la possession du débiteur peuvent être saisis, quels qu'ils soient.

" MUNICIPALE DE TERRAIN POUR TAXES :—*Vide* ENREGISTREMENT.

" DE PROPRIETE POUR TAXES MUNICIPALES. Sous les dispositions de la sec. 11 du ch. 9 des S. C. de 1863, 27 Vic., intitulé: " Acte pour amender de nouveau l'acte municipal

refondu du Bas-Canada, chapitre vingt-quatre des Statuts Refondus pour le Bas-Canada," qui se lit comme suit: "Toute action pour faire annuler une vente faite par un conseil municipal en vertu de la section soixante-et-unième dudit acte en premier lieu mentionné, devra être intentée dans les deux ans qui suivront l'adjudication de la propriété vendue, et toute action pour faire annuler une vente faite avant le présent acte, en vertu de ladite section, devra être intentée dans les deux ans suivant la passation du présent acte," l'adjudicataire de bonne foi d'un immeuble vendu par l'autorité municipale sous les dispositions des sections 59, 60 et 61 du ch. 24 des S. R. B. C. de 1861, intitulé: "Acte concernant les Municipalités et les Chemins dans le Bas-Canada," peut, à l'encontre d'une demande en revendication du propriétaire de l'immeuble vendu, invoquer la prescription de deux ans, décrétée par ladite sec. 11 dudit ch. 9 des statuts de 1863, à compter de l'adjudication; le temps pour prescrire datant de l'adjudication, et non de la date de l'acte de vente consentie par la municipalité. Cette prescription s'applique, vis-à-vis de l'acquéreur, dans le cas où les corporations municipales locales et de comté n'ont pas suivi les formalités requises par la loi, et même lorsque les taxes pour le recouvrement desquelles la vente a eu lieu, n'étaient pas dues. Mais cette prescription de deux ans ne peut être invoquée par les municipalités qui ont vendu et fait vendre un immeuble pour taxes qui n'étaient pas dues, ou sans observer les formalités requises par la loi, pour les dommages soufferts par le propriétaire de cet immeuble, qui peut les réclamer des corporations en faute, après les deux ans écoulés depuis l'adjudication, sans égard aux dispositions du statut de 1863. C'est aux corporations municipales à faire voir qu'elles ont suivi toutes les formalités requises par la loi. (*La Corporation du comté d'Arthabaska et al.* et *Barlow*, C. B. R. en appel, Québec, 19 mars 1870, DUVAL, J. en C. (*dissident*), CARON, J., DRUMMOND, J. (*dissident*), BADGLEY, J., MONK, J., confirmant le jugement de C. S. R., Québec, 5 octobre 1868, STUART, J. (*dissident*), TASCHEREAU, J., et BOSSÉ, J., qui infirmait le jugement de C. S., Arthabaska, 27 décembre 1867, POLETTE, J., 14 J., p. 226; 1 R. L., p. 759; 14 R. L., p. 697, et 20 R. J. R. Q., p. 157)

VENTE DE PROPRIETE POUR TAXES MUNICIPALES. Le propriétaire d'un immeuble qui le vend à un tiers ne peut réclamer de la corporation municipale locale et de la corporation de comté, des dommages représentant la valeur de cet immeuble vendu illégalement pour taxes par ces corporations, tant que l'acquéreur en possession n'a pas été troublé ou évincé par l'adjudicataire à la vente municipale. (*La corporation du comté d'Arthabaska et al.* et *Barlow*, C. B. R. en appel, Québec, 19 mars 1870, DUVAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., confirmant le jugement de C. S. R., Québec, 5 octobre 1868, STUART, J., TASCHEREAU, J., et BOSSÉ, J., 14 J., 226; 1 R. L., p. 759; 14 L. R., p. 697, et 20 R. J. R. Q., p. 157)

" PAR LE SHERIF:—*Vide* OPPOSITION A FIN D'ANNULER.

" DE VAISSEAUX NAVIGUANT A L'INTERIEUR. On peut vendre une partie d'un vaisseau enregistré, comme par exemple la moitié, le quart de ce vaisseau, et il n'est pas nécessaire, pour la validité de la vente sous la section 14 du ch. 41 des statuts refondus du Canada de 1859, intitulé: "Acte concernant l'enregistrement des vaisseaux naviguant à l'intérieur," de dire le nombre de parts vendues, pourvu

que la partie vendue corresponde à un nombre intégral des parts du vaisseau; et il est du devoir du collecteur des douanes du port où le vaisseau a été enregistré, d'enregistrer une vente ainsi faite. (*Moore* vs *The Home Insurance Company*, C. S., Montréal, 30 décembre 1869, MACKAY, J., 14 J., p. 77, et 20 R. J. R. Q., p. 20)

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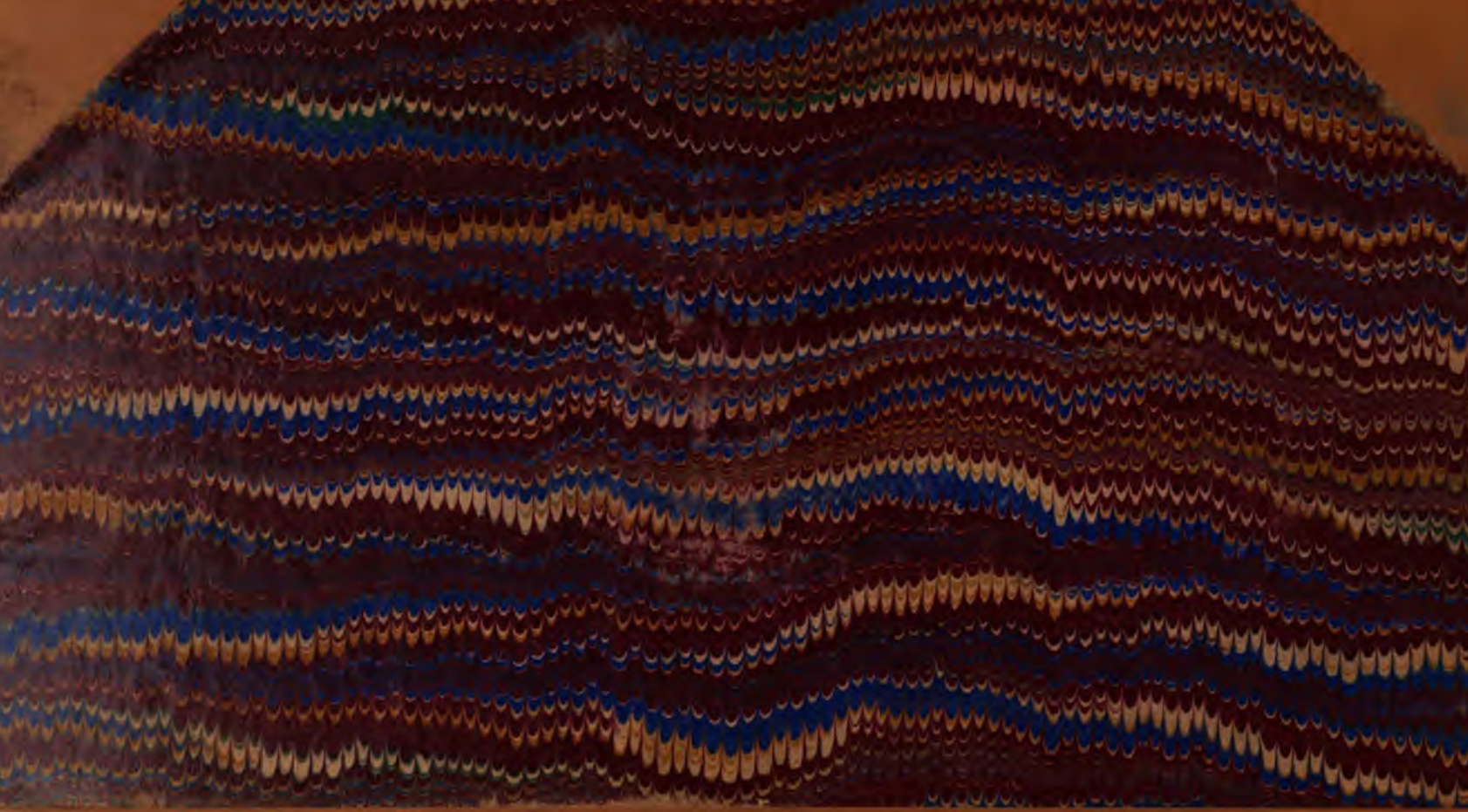
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